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IN THE

Supreme Court of the United States

JOEL HJORTNESS, A MINOR, BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS ERIC HJORTNESS AND GAIL HJORTNESS, ERIC HJORTNESS, AND GAIL HJORTNESS,

Petitioners,

v.

NEENAH JOINT SCHOOL DISTRICT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the procedural safeguards of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, which protect and ensure the rights of parents to participate in the development of their child's individualized education program ("IEP"), are violated when a school district unilaterally predetermines a child's placement before an IEP meeting with the parents and before an IEP has been formulated.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Joel Hjortness, a minor, by and through his parents and legal guardians Eric Hjortness and Gail Hjortness, Eric Hjortness, and Gail Hjortness respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The amended opinion of the court of appeals, Pet. App. 1a-13a, is reported at 507 F.3d 1060. Its decision denying the petition for rehearing and rehearing en banc, Pet. App. 76a-83a, is reported at 508 F.3d 851.

The May 6, 2005 decision, Pet. App. 35a-75a, of the State of Wisconsin Division of Hearings and Appeals administrative law judge is unreported. The June 27, 2006 decision and order, Pet. App. 14a-34a, of the United States District Court for the Eastern District of Wisconsin is unreported but available at 2006 WL 1788983 (E.D. Wis. June 27, 2006).

JURISDICTION

The court of appeals issued its judgment and opinion on August 20, 2007. This opinion was amended on November 14, 2007, when Petitioners' timely petition for rehearing and rehearing en banc was denied. On December 17, 2007, Justice Stevens extended the time for filing this petition to and including March 13, 2008. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

20 U.S.C. § 1401(9), which provides that:

> The term "free appropriate public education" means special education and related services that –
>
> . . . .
>
> (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1414(d)(3)(A), which provides that:

> In developing each child's IEP, the IEP Team . . . shall consider . . . (ii) the concerns of the parents for enhancing the education of their child . . . .

20 U.S.C. § 1415(b), which provides that:

> The procedures required by this section shall include the following:
>
> (1) An opportunity for the parents of a child with a disability to . . . participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child . . . .

STATEMENT OF THE CASE

This case raises a fundamentally important question of federal education law about whether a school district can circumvent the procedural safeguards of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, by predetermining a child's placement in a public school before the meeting with the parents where the parents and district members are required to develop an individualized education program ("IEP") for the child.

In the decision below, a deeply divided panel of the Seventh Circuit held that a school district did not engage in impermissible predetermination when there were uncontested findings of fact that it unilaterally made a public school placement determination prior to the IEP meeting with the parents and prior to the formulation of the child's IEP. This holding conflicts with the clear holdings of other circuits that such predetermination is a procedural violation of the IDEA. Indeed, in a dissent from denial of rehearing en banc, Judge Ripple warned that "[u]nless this situation is corrected swiftly, the result will be a drastic disruption in the administration of the statutorily mandated consultative procedure between parents and school officials and a significant dilution of parental rights to participate in the education of their child." Pet. App. 83a (Ripple, J., dissenting).

This Court should grant the petition in order to resolve this conflict and to prevent the IDEA's procedural safeguards from becoming a meaningless formality. The court of appeals' decision enables school districts unilaterally to choose public school placement and then hold an IEP meeting and draft an IEP that justifies that placement. This backward process denies parents the statutorily required opportunity to participate in the creation of their child's IEP and in the subsequent placement determination based on that IEP.

Importantly, the backward process also jeopardizes the child's right to a free and *appropriate* education. The purpose of the IEP process is for the school district, with the involvement of the parents, to gather information about the child's unique needs, consider various options, and *then* make a placement determination based on all of this information and

the goals and objectives specified in the IEP. If the school district determines placement before it has the proper foundation, then there is an unacceptable risk that it will deny the child an appropriate placement. It is for this reason that the IDEA's procedural safeguards are critically important.

Under the decision below, however, parents can be deprived of a real opportunity for meaningful participation in the placement determinations for their children. This Court's intervention therefore is necessary to ensure that all school districts collaborate with parents in meaningful IEP meetings to ensure individualized placement determinations, not just to reiterate unilateral and preordained determinations.

A. Statutory Background.

Congress enacted the IDEA in response to a longstanding concern that "the educational needs of millions of children with disabilities were not being fully met because . . . the children did not receive appropriate educational services." 20 U.S.C. § 1400(c)(2); see also *Bd. of Educ.* v. *Rowley*, 458 U.S. 176, 179 (1982) (noting Congress' concern that "a majority" of disabled children in the United States did not receive appropriate educational services). The IDEA was intended to remedy this concern by "ensur[ing] that all children with disabilities have available to them a free appropriate public education" and by "ensur[ing] that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(d)(1)(A) & (B). See *Winkelman ex rel. Winkelman* v. *Parma City Sch. Dist.*, 127 S. Ct. 1994, 2000 (2007) (citing these goals).

This Court consistently has recognized the critical importance of the IDEA's procedural protections.

Rowley, 458 U.S. at 205 ("the importance Congress attached to these procedural safeguards cannot be gainsaid"). A key purpose of the statutorily mandated process is to ensure the rights of parents to participate in educational decisions regarding their disabled child. See, *e.g.*, 20 U.S.C. § 1415(b)(1) (parents must be given the opportunity to examine all records relating to their child and "to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child"); *Winkelman*, 127 S. Ct. at 2000-01 (discussing numerous IDEA provisions that "mandate or otherwise describe parental involvement"). In particular, this Court has recognized the importance of parental participation in the development of the IEP that is mandated for each child:[1]

> It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, *e.g.*, §§ 1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard.

Rowley, 458 U.S. at 205-06; see also *id.* at 206 (Congress concluded "that adequate compliance with the procedures prescribed would in most cases assure

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[1] The IEP is a detailed, written statement that must include a description of the child's present levels of educational performance, measurable annual goals and specific short-term objectives, and a statement of the services to be provided to the child. 20 U.S.C. § 1414(d)(1)(A).

much if not all of what Congress wished in the way of substantive content in an IEP").

Parental participation in the development of the IEP is of fundamental importance under the IDEA because the IEP is the "primary vehicle" for implementing the statute's underlying goals. *Honig* v. *Doe*, 484 U.S. 305, 311 (1988). Accordingly, Congress provided that the team that develops the IEP must include the parents, 20 U.S.C. § 1414(d)(1)(B)(i), and must consider "the concerns of the parents for enhancing the education of their child," *id.* § 1414(d)(3)(A)(ii). In addition, the IEP team must "revise[] the IEP as appropriate" to address information about the child provided by the parents. *Id.* § 1414(d)(4)(A)(ii). Parents are entitled to administrative and judicial review of the IEP. *Id.* § 1415(f), (i)(2); *Winkelman*, 127 S. Ct. at 2002 (parents enjoy "enforceable rights" at the administrative stage and in federal court). In light of these robust procedural protections, this Court has concluded that "[t]he IEP proceedings entitle parents to participate not only in the implementation of IDEA's procedures but also in the substantive formulation of their child's educational program." *Id.* at 2004; see also *Schaffer ex rel. Schaffer* v. *Weast*, 546 U.S. 49, 53 (2005) ("Parents and guardians play a significant role in the IEP process.").

The school district must provide the free appropriate public education "in conformity with" the child's IEP. 20 U.S.C. § 1401(9). In particular, the child's educational placement must be "based on the child's IEP." 34 C.F.R. § 300.116(b)(2) (formerly § 300.552(b)(2)). Finally, parents must be members of "any group that makes decisions on the educational placement of their child." 20 U.S.C. § 1414(e).

B. Factual Background.[2]

Eric and Gail Hjortness are the parents of Joel Hjortness, who was born on August 27, 1990. Pet. App. 38a. Joel has been diagnosed with severe behavioral and emotional disabilities, including at various times "obsessive compulsive disorder, Tourette's disorder, attention deficit/hyperactivity disorder, autistic spectrum disorder, oppositional defiant disorder, and anxiety disorder." *Id.* at 39a. Though quite bright, Joel's disorders "manifest themselves in a wide range of problem behaviors that interfere with his learning and the learning of others," including difficulties with social communication and understanding social cues. *Id.*

Joel attended public schools in the Neenah Joint School District ("the District") until May 2003, when his parents withdrew him "because they believed the District was not appropriately addressing [his] behaviors that were manifestations of his disabilities." Pet. App. 39a. They eventually enrolled him at the Sonia Shankman Orthogenic School ("SSOS") in Chicago, which is "a coeducational residential treatment program for children in need of support for behavioral and emotional issues" that employs small class sizes. *Id.* at 42a.

In November of 2003, the IDEA required the District to conduct a three-year reevaluation of Joel. Pet. App. 40a. To this end, a team was formed to gather data and assess Joel's educational needs. In a meeting held on February 26, 2004, which included the parents, the team "identified the proposed testing to be conducted." *Id.* at 41a. On March 12, 2004, three members of the team (none of whom had

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[2] This factual statement is taken from the ALJ's findings of fact.

worked with Joel) visited SSOS to observe Joel and interview staff who had worked with him. *Id.* at 42a-44a. The reevaluation meeting was held on March 17, 2004, with the parents present. *Id.* at 44a-45a. Based on the data and evaluations, the participants concluded that Joel met the special education criteria for autism and for other health impairment ("OHI"). *Id.* at 45a.

The formal meeting to develop Joel's IEP was held on April 22, 2004, with Mrs. Hjortness in attendance. Pet. App 47a. At the beginning of the meeting, the District representative who led the meeting explained that the discussion "would not be guided by the existing IEP" – which had been developed before there was a significant focus on Joel's autism and before Joel went to SSOS – and that the team intended to start "from scratch." *Id.* at 48a. Notwithstanding the stated intention to craft a new IEP, only one specific annual goal was discussed at the meeting and "no specific short term objectives were identified." *Id.* The final phase of the meeting involved "determining" Joel's placement, even though at the time of that discussion, "specific goals had largely not yet been articulated, and no short term objectives had been crafted." *Id.*

With respect to placement, the members of the IEP team all agreed that Joel needed a small class size, but when Mrs. Hjortness asked the District to specify "an approximate class size" that it could offer, the District demurred. Pet. App. 49a. Mrs. Hjortness also asked that SSOS be considered as a placement. *Id.* at 50a. The District representative "dismissed this as an appropriate consideration . . . unless it were first determined that [the] IEP could not be implemented in the District schools." *Id.* Ultimately, SSOS "was not considered" as a possible placement

because the IEP team "determined" that the IEP could be implemented in the District schools. *Id.*; see also *id.* (the District representative later stated that having "determined" that the IEP could be implemented in District schools, "there were no other options to consider").

After the IEP team meeting, District staff members wrote and finalized the IEP without any participation by the parents. Pet. App. 51a. That document makes plain that the school district had little interest in developing new approaches for Joel or in recognizing his substantial progress at SSOS, and instead merely re-worked the prior, stale IEP. The finalized IEP included four annual goals and several short term objectives in support of each goal. *Id.* at 51a-52a. Of the four annual goals, only one "was explicitly discussed at the IEP meeting"; the remaining three goals were virtually "identical" to the goals in the previous IEP. *Id.* at 51a. The short term objectives in support of each goal "were not specifically discussed or crafted at the IEP meeting"; instead, most of these objectives were "substantially identical" to the corresponding objectives in the previous IEP. *Id.* at 52a. The District had given no indication at the IEP meeting, however, "that the goals and objectives in the IEP being developed would be substantially the same as the goals and objectives contained in the preceding IEP." *Id.*

The District mailed the IEP to the Hjortnesses, along with a formal offer to place Joel in District schools. Pet. App. 55a. They rejected the placement offer, and Joel continued to attend SSOS. *Id.* at 55a, 56a-57a.

C. Proceedings Below.

Due Process Hearing Before ALJ. On June 18, 2004, the Hjortnesses filed a request for a due process hearing with the State of Wisconsin Division of Hearings and Appeals, seeking reimbursement for the costs of Joel's placement at SSOS. Following a five-day hearing and briefing by the parties, the ALJ found that the IEP offered by the District was substantively appropriate and reasonably designed to provide Joel with a free appropriate public education. Pet. App. 56a, 72a.

It also found, however, that the District had violated the Hjortnesses' procedural rights in two critical and related respects, and that these procedural violations denied Joel a free appropriate public education. *First,* the ALJ found that the District "entered the IEP meeting having predetermined that the placement of the Student under the IEP to be developed at the meeting would be in the District schools," and that this "predetermination of the placement denied the Parents meaningful participation in the IEP process." Pet. App. 51a, 56a. *Second*, the ALJ found that "[t]he District's formulation of the goals and objectives [of the IEP] wholly outside the IEP team meeting, without the Parents participating, denied the Parent[s] meaningful participation in development of this essential component of the IEP, and constitutes a denial of a free appropriate public education." *Id.* at 65a. Taking these findings together, the ALJ found that the process was completely backward: "The conclusion is inescapable that the drafters of the IEP, knowing that the placement determination was for a small group setting in the District schools, endeavored to craft goals and short term objectives that fit this placement determination." *Id.* at 64a.

With respect to predetermination, the ALJ noted that "[t]he most compelling circumstance supporting this finding is that the District determined the placement to be in the District schools before it formulated the goals and objectives that were to be included in the IEP." Pet. App. 66a. In this regard, the ALJ noted that "[p]lacement must be determined 'based on the child's IEP,'" and that it therefore "is premature to make a placement determination before an IEP is completed." *Id.* (citing 34 C.F.R. § 300.552). The ALJ also relied on the fact that "the District steadfastly refused to consider the Parent's request that the District consider placement at SSOS." *Id.*; see also *id.* (the District representative at the IEP meeting "would permit no discussion of SSOS as a placement").

Based on these procedural violations, the ALJ ordered the District to reimburse the Hjortnesses for the costs of Joel's tuition at SSOS for the 2004-05 ordinary school year ($26,788.32). Pet. App. 73a. The ALJ did not order reimbursement for Joel's room and board because he concluded that a residential placement was not necessary to provide him with an appropriate education. *Id.*

District Court Decision. Both parties sought judicial review in the United States District Court for the Eastern District of Wisconsin. Pet. App. 14a-34a. The district court accepted the administrative record developed by the ALJ and did not take any additional evidence. It reversed the portions of the ALJ decision concluding that the District had committed procedural violations of the IDEA, which had denied Joel a free appropriate public education. *Id.* at 33a-34a. Accordingly, the district court reversed the reimbursement award. *Id.*

On the predetermination issue, the court held that it could not "reconcile ALJ Coleman's ruling with his other findings and with the requirements of the IDEA." Pet. App. 27a. The district court then cited the District's statutory obligation to "mainstream Joel to the maximum extent appropriate," *id.* (citing 20 U.S.C. § 1412(a)(5)(A)), and stated that "the District had no obligation to consider placing Joel at SSOS unless and until it concluded that he could not receive a free and appropriate public education in district schools." *Id.* at 27a. In sum, the district court concluded:

> The District determined, and the ALJ found, that Joel could receive a free and appropriate public education in district schools. Having so concluded, the District was entitled to draft an IEP that assumed Joel would be educated in the District's schools, and was not required to consider placement at SSOS.

Id. at 28a (citation omitted).

Seventh Circuit Decision. A split panel of the Seventh Circuit upheld the district court's decision. With respect to predetermination, the panel held:

> The ALJ found that the school district made its decision to place Joel in public school before the IEP was written. However, the IDEA requires that the school district educate Joel with his nondisabled peers to the "greatest extent appropriate." 20 U.S.C. § 1412(a)(5)(A). Recognizing that we owe great deference to the ALJ's factual findings, we find that the IDEA actually required that the school district assume public placement for Joel. Thus, the school district did not need to consider private placement once it

> determined that public placement was appropriate.

Pet. App. 10a.[3]

Judge Rovner dissented. On the predetermination issue, she noted that the ALJ's factual finding that predetermination had occurred unquestionably was not "clearly erroneous." Pet. App. 11a. She further noted that the IDEA's mainstreaming presumption "does not permit a school district to circumvent the procedures that Congress has mandated by predetermining that a disabled student should be placed in one of its own schools" because "[a] placement decision is to be based on the IEP." *Id.* Ultimately, she argued that in this case, the IEP process "served merely to justify a placement decision that the District made unilaterally before IEP meetings with the parents were convened," which is exactly what decisions of several circuits "said is forbidden." *Id.* at 12a-13a (citing cases).

Dissent From Denial of Rehearing En Banc. The Seventh Circuit denied rehearing *en banc*, over

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[3] The court of appeals majority inexplicably asserted that "[t]he Hjortnesses have not argued that the school district's placement was not based on the IEP, in violation of 34 C.F.R. § 300.552(b)(2)." Pet. App. 7a n.2. Whether or not the Hjortnesses cited that regulation, the court of appeals itself acknowledged that they claimed that their procedural rights under the IDEA were violated because "the school district made its placement decision *before the IEP was written*." *Id.* at 7a (emphasis added). If the placement decision *preceded* the formulation of the IEP, as the ALJ found, then it necessarily could not have been "based on" that not-yet-existing written statement, as required by the regulation. *See also id.* at 37a (the issues identified by the parents included whether the IEP was procedurally deficient because the IEP objectives "were crafted after" the IEP team determined placement).

the vigorous dissent of Judge Ripple and three other judges. Pet. App. 76a-83a. The dissent asserted that the panel's "approval of predetermination" created a clear circuit split. *Id.* at 80a-81a, 83a (analyzing cases). In this regard, the dissent argued that the process sanctioned by the panel majority gave school districts "an incentive to start with a desired result and work backwards to develop an IEP with only the minimal goals that are achievable by the preselected placement." *Id.* at 82a. The dissent further argued that the panel majority improperly invoked the IDEA's mainstreaming provision because, although "[t]he school district may *presume* placement in a public school," it "may not *predetermine* placement there" without consultation with the parents. *Id.* (emphasis in original). The dissent concluded by looking to this Court and noting that "[u]nless this situation is corrected swiftly, the result will be a drastic disruption in the administration of the statutorily mandated consultative procedure between parents and school officials and a significant dilution of parental rights to participate in the education of their child." *Id.* at 83a.

REASONS FOR GRANTING THE PETITION

The decision below conflicts with other circuits' holdings that a school district commits a procedural violation of the IDEA by predetermining a child's placement before the IEP meeting with the parents and before the formulation of the child's IEP. The Seventh Circuit here found no procedural error despite the ALJ's findings that the District made a placement decision before formulating the IEP with the participation of the parents. The inconsistency between the holdings of the Seventh Circuit and other circuits will entangle both parents and school districts in complex litigation regarding the role that

the IEP process plays in determining a child's placement. The decision also raises a fundamentally important question of federal education law about the process that must be employed when the school district proposes a public school placement that the parents oppose. For these reasons, this case merits review.

I. THE DECISION BELOW CONFLICTS WITH NUMEROUS DECISIONS OF OTHER COURTS OF APPEALS THAT A SCHOOL DISTRICT CANNOT PREDETERMINE PLACEMENT BEFORE A CHILD'S IEP IS FORMULATED WITH PARENTAL INPUT.

Other courts of appeals consistently have held that a school district commits a procedural violation of the IDEA when it determines a child's placement before the IEP is formulated with the participation of the parents. In *Spielberg ex rel. Spielberg* v. *Henrico County Public Schools*, 853 F.2d 256, 259 (4th Cir. 1988), for example, the Fourth Circuit held that a school district committed a procedural violation of the Education of All Handicapped Children Act (the statutory precursor to the IDEA) when district officials determined a child's educational placement "and then developed an IEP to carry out their decision." The court of appeals explained that the regulations require "that placement should be based on the IEP." *Id.* (citing 34 C.F.R. § 300.552). It then concluded that the school district's decision to place the child at a public school "before developing an IEP on which to base that placement" violated this regulation, as well as "the spirit and intent of the EHA, which emphasizes parental involvement." *Id.* In sum, the court of appeals concluded that "[a]fter the fact [parental] involvement is not enough." *Id.* It further held that by committing this procedural

violation, the school district had failed to provide the child with a free appropriate public education. *Id.*

The Sixth Circuit similarly found that a school district committed a procedural violation of the IDEA, and deprived a child of a free appropriate public education, when it "pre-decided" not to offer a child a private education program, "regardless of any evidence concerning [the child's] individual needs and the effectiveness of his private program." *Deal* v. *Hamilton County Bd. of Educ.*, 392 F.3d 840, 857 (6th Cir. 2004). The court of appeals concluded that school district personnel "did not have open minds" at the meetings with the parents because they "refused even to discuss the possibility of providing" the parents' suggested program. *Id.* at 858. It further held that "[a] placement decision may only be considered to have been based on the child's IEP when the child's individual characteristics, including demonstrated response to particular types of educational programs, are taken into account." *Id.* at 859. See also *Nack ex rel. Nack* v. *Orange City Sch. Dist.*, 454 F.3d 604, 610 (6th Cir. 2006) ("Predetermination amounts 'to a procedural violation of the IDEA.'") (quoting *Deal*).

Other courts of appeals also have held that predetermination of placement violates the IDEA's clear procedural requirement that parents participate in the development of the IEP and the subsequent placement determination. See *W.G.* v. *Bd. of Trs.*, 960 F.2d 1479, 1484 (9th Cir. 1992) (school district "clearly did not comply with the procedures required by the IDEA" when it "proposed an IEP that would place [the student] in a preexisting, predetermined program," "assumed a 'take it or leave it' position at the [IEP] meeting" and "no alternatives to that program were considered" despite the objections of

the parents); see also *Fuhrmann ex rel. Fuhrmann* v. *E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1036 (3d Cir. 1993) (excluding parents from the development of the IEP or the placement process would constitute procedural violations of the IDEA) (citing *Spielberg*); *Schoenbach* v. *Dist. of Columbia*, No. 05-1591, 2006 WL 1663426, at *5 (D.D.C. June 12, 2006) ("Predetermination of school placement constitutes a procedural violation of the IDEA.") (citing *Spielberg* and *Deal*).[4]

The court of appeals' ruling below is wholly at odds with all of these decisions. The ALJ found that the District "entered the IEP meeting having predetermined that the placement of the Student under the IEP to be developed at the meeting would be in the District schools." Pet. App. 51a; see also *id.* at 66a ("the District entered the IEP team meeting having made up its mind to place the Student in a small group setting in the District schools under whatever IEP was formulated"). In making these findings, the ALJ relied on the fact that "the District steadfastly refused to consider the Parent's request that the District consider placement at SSOS." *Id.*; see also *id.* (the District representative "would permit no discussion of SSOS as a placement").

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[4] The Seventh Circuit previously seemed to recognize these principles, holding in *Board of Education* v. *Ross*, 486 F.3d 267, 274 (7th Cir. 2007), that a school district would "violate the IDEA" if its IEP meetings with the parents "were nothing but an elaborate effort to ratify a [placement] decision that the District had already made without their input." The court's refusal to rehear the instant case en banc suggests that *Ross* may not have continuing vitality. To be sure the conflict between *Ross* and the instant case is no reason to grant certiorari, but the confusion created by the panel here in the Seventh Circuit coupled with the clear conflict with other circuits underscores the need for "swift" resolution by this Court.

The court of appeals did not reject or overturn any of these findings. See Pet. App. 78a n.1 ("[t]he panel majority appears to have assumed the ALJ's finding that predetermination had occurred"). As a result, the court of appeals' holding that the District did not commit a procedural violation of the IDEA in this case conflicts with the holdings of other courts of appeals that school districts cannot unilaterally make placement determinations before the IEP meetings with the parents, and then adopt "take it or leave it" positions at those meetings and refuse to consider alternatives proposed by the parents. The outcome in this case simply cannot be reconciled with the findings of procedural violations in *Spielberg*, *Deal*, and *W.G.*

Moreover, the District impermissibly predetermined Joel's placement before his IEP was written or substantially developed. See Pet. App. 56a ("The IEP had not been substantially developed by the IEP team before the IEP [team] determined that the placement under the yet to be developed IEP would be in the District's schools"). The ALJ specifically found (and the court of appeals did not disavow) that SSOS "was not considered" as a possible placement at the IEP team meeting because the IEP team "determined" that the IEP could be implemented in the District schools. *Id.* at 50a; see also *id.* (the District representative later stated that having "determined" that the IEP could be implemented in District schools, "there were no other options to consider").

But the IEP was not yet written, and its core goals and objectives not yet formulated, when this "determin[ation]" was made at the IEP meeting. Joel's IEP did not exist until *after* the meeting, when the District drafted the IEP and formulated its goals

and objectives without the involvement of the parents. As a result, the District's placement determination cannot have been "based on" the not-yet-existing IEP, and the IEP can only be viewed as an after-the-fact justification of that determination. As Judge Rovner pointed out in her dissent, this backward process, which forecloses meaningful parental involvement, is "exactly" what the courts in *Spielberg* and *Deal* "said is forbidden." Pet. App. 12a-13a.

There is no merit to the court of appeals' suggestion that the District's refusal to consider the parents' proposed private placement at the IEP meeting was a permissible application of the Act's presumption in favor of mainstreaming. See Pet. App. 10a (citing 20 U.S.C. § 1412(a)(5)(A)). Indeed, the court of appeals' analysis on this point improperly conflates substantive and procedural protections under the IDEA in a way that diminishes parental rights and will create considerable confusion for all parties involved in the IEP process. It is true as a substantive matter that school districts are required to place students in the least restrictive environment possible. 20 U.S.C. § 1412(a)(5)(A). It is also true that a school district has no obligation under the IDEA to provide private school placement *if* it can provide a free appropriate education to a student in its own facilities. See *id.* § 1412(a)(10)(C)(i) (school district has no obligation to reimburse parents for the costs of a private education if it made a free appropriate education available to a student in the district's schools but the parents unilaterally elected private placement); see also *Sch. Comm. of the Town of Burlington* v. *Dep't of Educ.*, 471 U.S. 359, 369 (1985) (the IDEA contemplates that "education will be provided where possible in regular public schools").

But pursuant to the IDEA's procedural requirements, the inquiry and determination as to whether a proposed public placement will in fact provide the child with a free appropriate education must involve the parents and must be based on a fully developed and properly formulated IEP. See, *e.g.*, 20 U.S.C. § 1415(b)(1) (parents must have the opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child"); *id.* § 1414(d)(1)(B)(i) (the IEP team must include the parents); *id.* § 1414(e) (parents must be members of "any group that makes decisions on the educational placement of their child"); *id.* § 1401(9) (school district must provide the free appropriate public education "in conformity with" the child's IEP); 34 C.F.R. § 300.116(b)(2) (formerly § 300.552(b)(2)) (a child's educational placement must be "based on the child's IEP").

Under this statutory scheme, it is impossible for the school district to know, and improper for it to "determine," whether public placement is appropriate prior to holding the IEP meeting and receiving the input of the parents and other members of the IEP team. It is also impossible for the school district properly to determine whether public placement is appropriate without assessing the child's current levels of educational performance and formulating the annual goals and objectives that are contained in the IEP. Only after gathering the necessary facts and formulating the content of the IEP, *in consultation with the parents*, can the IEP team have before it the statutorily required basis for determining whether the public schools can provide an appropriate education. In sum, a school district cannot unilaterally determine that public school

placement will provide the child with a free appropriate education. Instead, the district must consider the concerns of the parents on that issue and on whether private alternatives should be considered.

The court of appeals' conclusion that a school district does not engage in impermissible predetermination when it unilaterally makes a public school placement determination prior to the IEP meeting with the parents and prior to the formulation of the child's IEP puts the Seventh Circuit at odds with its sister circuits, none of which has recognized any such public placement exception to the rule against predetermination. Accordingly, the decision below creates a different legal rule for resolving predetermination claims in the Seventh Circuit, at least when the school district's predetermination involves public placement, which will yield different outcomes. The prospect that parents in the Seventh Circuit who challenge procedures used to make placement determinations face a different legal regime than parents in other circuits, and therefore that their children will have fundamentally different protections under the IDEA, is intolerable and warrants review by this Court.

II. THE COURT OF APPEALS' PREDETERMINATION RULING POSES AN ISSUE OF FUNDAMENTAL IMPORTANCE TO FEDERAL EDUCATION LAW.

The court of appeals' conclusion that school districts do not engage in impermissible predetermination when they unilaterally make public school placement determinations prior to IEP meetings with the parents and prior to the formulation of IEPs also poses an "important question" of federal education law that warrants this Court's attention. See Sup. Ct. R. 10(c).

The court of appeals essentially created an exception to the rule against predetermination in cases where the school district proposes public placement but the parents advocate private placement. As shown above, this exception is fundamentally at odds with the procedural requirements of the statute. These requirements – which apply in all cases and to all children – mandate a cooperative process with parental input into the formulation of the IEP, followed by a team decision concerning an appropriate placement. This process recognizes the unique role of the parents in offering critical insights into the nuances of their child's disability and the child's responses to different educational settings. The parents' perspective, as Congress recognized, enables the school district to design an educational program and to make placement determinations that address the unique needs of the disabled child. By holding that this process does not apply when the school district proposes public placement – an exception that has no basis in the statutory text – the court of appeals contravenes the IDEA's fundamental purpose by diminishing the critical role that Congress has designed for parents.

Significantly, if the decision below is left standing, school districts will be able to use the presumption in favor of public school placement to short circuit the IEP process. By simply taking the position that public school placement is appropriate, school districts will be able to arrive at an IEP meeting with this predetermined decision and then draft an IEP that justifies this decision. This unilateral – and backward – process effectively eliminates any meaningful parental involvement and any meaningful discussion of private school placement. If school districts can "determine" that public placement is

appropriate prior to the IEP meeting, then they can avoid attempts by parents or experts to voice contrary views that public placement is *not* appropriate and that private placement is necessary for the school district to fulfill its statutory obligations to the child. Silencing parents in this way would be detrimental to the best interests of the disabled children that the IDEA is designed to protect. Given the complex educational needs of some disabled children, it is crucial that parents have an opportunity to discuss alternate placements and that their views be considered by the school district.

Accordingly, this case poses a fundamentally important question about how placement determinations are to be made under the IDEA. The court of appeals' decision creates needless confusion for all participants concerning the role that parents play in the process, particularly when the parents oppose a school district's proposed public school placement. It is essential that school districts, parents and other participants have a clear understanding of how the process is supposed to work and what is required of a school district before it makes a determination on a disabled student's placement. Without such an understanding, IEP proceedings will be increasingly contentious and will generate fact-intensive litigation as parties challenge uncertain and varying procedures used to reach results in individual cases. This Court should grant the petition to address these fundamentally important and recurring questions of federal education law.

* * * *

The implications of the issues raised in this case are enormous. The IDEA affects millions of children, parents, and educators. In 2006, school systems served 6,693,279 children between the ages of 3 and

21 under the IDEA. U.S. Office of Special Educ. Programs, *Part B Annual Report* tbl.1-1, *available at* https://www.ideadata.org/tables30th/ar_1-1.xls (updated July 15, 2007). Nearly 50,000 teachers provide special education instruction. U.S. Office of Special Educ. Programs, *Part B Annual Report* tbl.3-1, *available at* https://www.ideadata.org/tables30th/ar_3-1.xls (updated July 17, 2007) (Fall 2005). In addition, from 2001 to 2006, funding for IDEA grants to States increased by 68%, from $6.3 billion to $10.6 billion. Exec. Office, *Fiscal Year 2007 Budget: Department of Education* 81 (2006), *available at* http://www.gpoaccess.gov/usbudget/fy07/pdf/budget/education.pdf.

These figures, however, present only part of the picture. Numerous parents devote countless hours to preparing for and attending IEP meetings. Under the clear requirements of the statute, the IEP team meeting is supposed to provide the parents with a real and meaningful opportunity to discuss their child's educational program, to raise concerns about how best to educate their child, and to discuss an appropriate placement to achieve that goal. Under the Seventh Circuit's legal standard, however, parents' participation becomes purely formalistic and children may be denied a free and appropriate education. In this case, Joel Hjortness and his parents would have received very different treatment by the school district if they lived in Richmond, Virginia or Nashville, Tennessee. That is an intolerable situation that should be corrected now.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 06-3044

JOEL HJORTNESS, A Minor, by and Through his Parents and Legal Guardians ERIC HJORTNESS and GAIL HJORTNESS, ERIC HJORTNESS, and GAIL HJORTNESS,

Plaintiffs-Appellants,

v.

NEENAH JOINT SCHOOL DISTRICT,

Defendant-Appellee.

Argued Jan. 18, 2007
Decided Aug. 20, 2007
Amended Nov. 14, 2007

Before BAUER, MANION, and ROVNER, *Circuit Judges*.

BAUER, *Circuit Judge*.

Joel Hjortness and his parents brought a due process claim against the Neenah Joint School District ("the school district") for denying Joel a "free appropriate public education," in violation of the Individuals with Disabilities Education Act ("IDEA") 20 U.S.C. § 1415. An administrative law judge ("ALJ") found in favor of the Hjortnesses, and the district court reversed by granting the school district's motion for summary judgment. We affirm.

I. Background

Joel has been diagnosed at various times with obsessive compulsive disorder, Tourette's disorder, attention deficit/hyperactivity disorder, autistic spectrum disorder, oppositional defiant disorder, and anxiety disorder. Despite these disorders, he is exceptionally bright with an IQ of 140.

Until May 2003, Joel attended public school at Shattuck Middle School in the Neenah Joint School District,[1] where he and his parents resided. In May 2003, Joel's parents withdrew him from Shattuck because they believed that the school district was not adequately addressing his behavioral needs. His parents enrolled him in private school: first, at the Kennan Academy in Menasha, Wisconsin until January 2004, and thereafter as a residential student at the Sonia Shankman Orthogenic School ("SSOS") in Chicago, Illinois.

In November 2003, the school district began its process of reevaluating Joel, as required by law. The school district planned to gather data and then to meet with Joel's parents to develop an individualized education plan ("IEP") for Joel. On March 12, 2004, a school psychologist, an occupational therapist, and an autism resource teacher from the school district observed Joel at SSOS and interviewed SSOS staff who had worked with him. Based on this observation and the results of other tests, the team concluded that Joel met the special education criteria for autism, other health impairment, and emotional behavioral disability.

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[1] At Shattuck, Joel maintained a grade point average of 3.5 as a regular education student.

The school district next developed an IEP for Joel. On April 22, 2004, the school district's special education director, a regular education teacher from Neenah High School and Shattuck Middle School, a special education teacher from each of these schools, a other health impairment consultant, and the three district staff members who had visited SSOS, Joel's mother, and her attorney met to develop the IEP. At the IEP meeting, the team discussed Joel's strengths and weaknesses. The team also discussed general goals for Joel's education, which included giving Joel instruction in a small group setting. They identified one specific goal: that Joel would raise his hand at least 50% of the time when appropriate. No other specific goals or short-term objectives were identified at the meeting.

After the IEP meeting, school district staff prepared Joel's IEP for May 17, 2004 through May 16, 2005. The IEP specified four goals: (1) Joel will demonstrate appropriate hand raising procedures 50% of the time in class; (2) Joel will increase his ability to follow directions given by authority figures by 50%, as measured by a teacher monitoring system; (3) Joel will increase his ability to interpret a situation and respond appropriately in 50% of situations, as measured by a monitoring system; and (4) Joel will increase his ability to respond appropriately when in competitive situations 50% of the time, as measured by a staff monitoring system. Of the four goals, only the first was explicitly discussed at the IEP meeting. The remaining goals were identical to the goals in Joel's previous IEP, except that the percentages specified were lower than the percentages identified in the preceding IEP, and the short term objectives in support of each goal varied from the short term objectives in the preceding IEP.

On June 18, 2004, Joel's parents requested a due process hearing to seek reimbursement for placing Joel at SSOS. The ALJ found that the school district complied with the substantive requirements of the IDEA by providing Joel with an IEP that was reasonably calculated to provide him with some meaningful educational benefit. The ALJ also found that the school district had committed a procedural violation of the IDEA because Joel's IEP was not substantially developed and the school district had decided to place Joel in its school before the IEP meeting, thereby denying him a free appropriate public education. As a result, the ALJ ordered the school district to reimburse the Hjortnesses $26,788.32 for the cost of Joel's private school placement. The school district and the Hjortnesses both appealed this decision to the district court. The school district moved for summary judgment, which the district court granted. The Hjortnesses filed this timely appeal.

II. Discussion

Whether a school district has offered a free appropriate public education to a disabled student is a mixed question of law and fact. *Heather S. v. State of Wisconsin*, 125 F.3d 1045, 1053 (7th Cir.1997). We review the administrative record and the district court's findings of fact deferentially, and we review questions of law *de novo*. *Bd. of Educ. v. Ross*, 486 F.3d 267, 270 (7th Cir.2007).

The IDEA requires that the school district, as a recipient of federal education funds, provide children with disabilities a free appropriate public educa-

tion in the least restrictive environment. *Id.* at 273. Specifically, the IDEA provides:

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A). The IDEA requires that the state determine what is uniquely "appropriate" for each child's education by preparing an IEP developed through the joint participation of the local education agency, the teacher, and the parents. An IEP is defined as "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of this title." 20 U.S.C. § 1401(14). A child's placement must be based on the IEP. 34 C.F.R. § 300.552(b)(2). The statute assures the parents an active and meaningful role in the development or modification of their child's IEP. *Ross,* 486 F.3d at 274. The statute imposes both a substantive obligation and a procedural obligation on the state. *Id.* at 273-74.

A. Substantive Compliance

The Hjortnesses first assert that Joel's IEP was substantively inadequate because it failed to fully identify Joel's disabilities and his resulting needs, his present levels of educational performance, and his annual goals and short term objectives. We disagree.

To be substantively appropriate, the IEP must be formulated so that Joel would receive the "basic floor of opportunity [, consisting of] access to specialized instruction and related services which are individually designed to provide educational benefit to [him]." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 201, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). To accomplish this, the IDEA requires, among other things, that the IEP include "a statement of the child's present levels of educational performance, including-(1) how the child's disability affects the child's involvement and progress in the general curriculum. . . ." 20 U.S.C. § 1414(d)(1)(A)(I).

As the ALJ indicated, considering that medical professionals have demonstrated difficulty in pinpointing Joel's disorders, it is unreasonable to expect the school district to do better in determining Joel's predominant or existing medical disorders. The school district properly considered the various medical diagnoses and educational assessments in determining that Joel met the criteria for autism and other health impairments.

Joel's "present levels of educational performance" did not reflect his current performance because current data was unavailable. Joel had not been attending school at the school district for almost a year, and SSOS was still in the process of observing Joel to gain insight on his behaviors. The school district gathered all the current information they could-by visiting SSOS, observing Joel, and meeting with his current teachers-and incorporated that data into his IEP.

Further, the Hjortnesses failed to present any evidence that Joel would not benefit educationally from the goals in his IEP. The goals and short term

objectives were targeted to develop his social skills and would have provided Joel with some meaningful educational benefit. It was appropriate for the IEP to contain substantially similar goals and objectives as were contained in the preceding IEP.

B. Procedural Compliance

The Hjortnesses next assert that Joel's IEP was procedurally inadequate because (1) the IEP was written without Joel's parents' participation in the development of its goals and objectives, (2) the IEP was written without an SSOS representative at the IEP meeting, and (3) the school district made its placement decision before the IEP was written.[2] We disagree.

Procedural flaws do not require a finding of a denial of a free appropriate public education. However, procedural inadequacies that result in the loss of educational opportunity result in the denial of a free appropriate public education. *Ross*, 486 F.3d at 276.

Considerable time was spent in multiple IEP conferences at which Joel's parents and their advocate participated. At several times during these conferences, the team attempted to set specific goals and objectives, but the Hjortnesses insisted that "the issue on the table [was whether the school district would] pay for [Joel] to be at Sonia Shankman where he needs to be." The school district arguably should have held a second IEP meeting to review the goals and objectives that were not discussed at the

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[2] The Hjortnesses have not argued that the school district's placement was not based on the IEP, in violation of 34 C.F.R. § 300.552(b)(2).

meeting. However, this procedural violation does not rise to the level of a denial of a free appropriate public education. The record does not support a finding that Joel's parents' rights were in any meaningful way infringed.

We note that this determination in no way contravenes our decision in *Ross*. In *Ross*, the parents of a girl with Rett syndrome[3] alleged, *inter alia*, that they were denied a meaningful opportunity to participate in the modification of their daughter's IEP, which constituted a procedural violation of the IDEA. 486 F.3d at 274. The *Ross* Court affirmed the district court's holding that the parents did in fact have a meaningful opportunity to participate in the comprehensive review of their daughter's situation and IEP, referencing a 32-page conference summary report of the seminal meeting at which they participated. *Id.* at 275. The consensus reached at the end of that meeting was to change the girl's placement; a decision that the girl's parents opposed. *Id.* However, the Court held that just because the placement was contrary to the parents' wishes, it does not follow that the parents did not have an active and meaningful role in the modification of their daughter's IEP, as required by the IDEA. *See id.* at 274-75.

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[3] Rett syndrome is a "neurodevelopmental disorder characterized by normal early development followed by loss of purposeful use of the hands, distinctive hand movements, slowed brain and head growth, gait abnormalities, seizures, and mental retardation." *Ross*, 486 F.3d at 269 (quoting National Institute of Neurological Disorders and Stroke, Rett Syndrome Fact Sheet, http://www.ninds.nih.gov/disorders/rett/detail_rett.htm?ccs=print).

In this case, it is not that Joel's parents were denied the opportunity to actively and meaningfully participate in the development of Joel's IEP; it was that they chose not to avail themselves of it. Instead of actively and meaningfully participating in the discussions at multiple IEP meetings, the Hjortnesses refused to talk about anything other than "[whether the school district would] pay for [Joel] to be at Sonia Shankman where he needs to be." As a result, the school district was left with no choice but to devise a plan without the meaningful input of Joel's parents. Under these circumstances, the parents' intransigence to block an IEP that yields a result contrary to the one they seek does not amount to a violation of the procedural requirements of the IDEA. To hold otherwise would allow parents to hold school districts hostage during the IEP meetings until the IEP yields the placement determination they desire.

Turning to the Hjortnesses' next argument, the IDEA did not require the school district to have an SSOS representative at the IEP meeting. A private school representative is only required to attend the meeting if the school district placed the child in the private school, *see* 34 C.F.R. § 300.349, which was not the case here. Even though they were not required to do so, the school district made quite an effort to ensure input from SSOS. The school district sent a team to SSOS to visit and interview Joel and his teachers. The school district also offered Joel's parents alternative meeting dates in an effort to allow them to invite SSOS to attend or participate by telephone. Even the resulting IEP included data from past evaluations, current observations, and teacher data that was supplied by SSOS. The school district also repeatedly offered to reconvene the meeting once more data from SSOS was available.

Finally, we turn to the appellants' main challenge-that the school district denied Joel a free appropriate public education because it predetermined Joel's placement. The ALJ found that the school district made its decision to place Joel in public school before the IEP was written. However, the IDEA requires that the school district educate Joel with his non-disabled peers to the "greatest extent appropriate." 20 U.S.C. § 1412(a)(5)(A). Recognizing that we owe great deference to the ALJ's factual findings, we find that the IDEA actually required that the school district assume public placement for Joel. Thus, the school district did not need to consider private placement once it determined that public placement was appropriate.

We find that the district court did not err in finding that the IEP was reasonably calculated to provide Joel with some meaningful education benefit and that the school district did not deny Joel a free appropriate public education.

III. Conclusion

For the foregoing reasons, we AFFIRM the judgment of the district court.

ROVNER, *Circuit Judge*, dissenting.

With respect, I believe that two procedural flaws in the IEP process compel reversal of the judgment. The ALJ found that before school officials met with Mrs. Hjortness to begin discussing the 2004-05 IEP, the school district already had "made up its mind to place the Student in a small group setting in the District schools under whatever IEP was formulated." R. 1 at 24; *id.* at 16 ¶ 32; *see also id.* at 23. The ALJ also found that most of the goals and short-term objectives incorporated into the IEP were determined after the April 22, 2004 meeting attended by Joel's mother and therefore were arrived at without the parents' input. *Id.* at 16 ¶¶ 33-35; *id.* at 23. Neither of these factual findings was clearly erroneous, and together they amply support the ALJ's conclusion that Joel's parents were deprived of meaningful participation in the IEP process and that Joel was deprived of a free appropriate public education.

The IDEA's presumption in favor of educating a disabled student with his nondisabled peers (*see ante* at 1066, citing 20 U.S.C. § 1412(a)(5)(A)) does not permit a school district to circumvent the procedures that Congress has mandated by predetermining that a disabled student should be placed in one of its own schools. A placement decision is to be based on the IEP. 34 C.F.R. § 300.116(b)(2) (formerly § 300.552). The IEP is the "primary vehicle" for implementing the underlying goals of the statute. *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 597, 98 L.Ed.2d 686 (1988); *see also id.* at 311, 108 S.Ct. at 598 (Congress "envision[ed] the IEP as the centerpiece of the statute's education delivery system for disabled children."). It is the IEP that assesses the student's

current educational performance, articulates a set of annual goals and short-term objectives in furtherance of those goals, and identifies the special education and other services necessary to help the student achieve those goals. 20 U.S.C. § 1414(d)(1)(A); *Honig*, 484 U.S. at 311, 108 S.Ct. at 597-98. A placement decision that is made before the IEP is drafted renders what Congress meant to be "the centerpiece of the statute's education delivery system for disabled children," *id.* at 311, 108 S.Ct. at 598, a meaningless formality. *See Bd. of Educ. of Township High Sch. Dist. No. 211 v. Ross*, 486 F.3d 267, 274 (7th Cir.2007) (if it were true that IEP meetings with parents "were nothing but an elaborate effort to ratify a decision that the District had already made without their input . . . then it would violate the IDEA"); *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 859 (6th Cir.2004); *Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 259 (4th Cir.1988). Predetermination of a child's placement necessarily renders irrelevant what happens next in terms of meetings between school officials and the child's parents. Even if Joel's parents had been more cooperative with District officials in the IEP process, as my colleagues suggest they should have been, *see ante* at 1065, it would have made no difference given that the District, as the ALJ found, had already decided where to place him. Whatever opportunities Mr. and Mrs. Hjortness were given to participate in the development of the IEP, and however substantively appropriate the IEP was on its face, the IEP process in this case served merely to justify a placement decision that the District made unilaterally before IEP meetings with the parents were convened. That is exactly what this court in *Ross*

(and our sister circuits in *Deal* and *Spielberg*) said is forbidden. 486 F.3d at 274.

Likewise, an IEP that is drafted largely in the absence of a student's parents is not the product of the interactive process that Congress required. *See, e.g., W.G. v. Bd. of Trustees of Target Range School Dist. No. 23*, 960 F.2d 1479, 1485 (9th Cir.1992). The fact that Joel's parents were involved in the process prior to the development of the IEP (*see ante* at 1065) is beside the point. The fact is, they were not actually involved in preparing the IEP, nor was the full IEP team reconvened for the parents' input once school officials had completed the plan. It is no answer to say that Joel's parents did not object to the ex parte drafting of the IEP once it was presented to them. *See* R. 33 at 14. That was not their burden. *See W.G.*, 960 F.2d at 1485. As the ALJ rightly observed, "it was the obligation of the District to recognize the procedural flaw[ ] and offer the Parents the opportunity to participate meaningfully in the development of the annual goals and objectives, and thereafter to discuss placement under the IEP as then appropriately developed." R. 1 at 23.

Because the procedure followed by the school district in this case was inconsistent with the core goals and requirements of the IDEA, I would reverse the district court's judgment and sustain the ALJ's determination that Joel's parents are entitled to reimbursement for the tuition they paid for Joel's private education in the 2004-05 school year.

I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
E.D. WISCONSIN

Nos. 05-C-0648, 05-C-0656

JOEL HJORTNESS, a minor, by and through his parents and legal guardians ERIC and GAIL HJORTNESS,

Plaintiffs,

v.

NEENAH JOINT SCHOOL DISTRICT,

Defendant.

June 27, 2006.

David J. Winkel, Winkel Law Office, Neenah, WI, Stephen Walker, Stephen Walker Attorney at Law, Beachwood, OH.

Bradley D. Armstrong, Lori M. Lubinsky, for Defendant.

DECISION AND ORDER

WILLIAM C. GRIESBACH, *District Judge*.

In this consolidated action, both parties seek judicial review of the May 6, 2005, decision of Administrative Law Judge William S. Coleman, Jr., of the Wisconsin Department of Hearings and Appeals following a due process hearing under the

Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1401 *et seq.* Following an extensive hearing and briefing by the parties, ALJ Coleman found that, although the individualized education plan offered by the School District was substantively appropriate, the School District had violated the Parents' procedural rights under the IDEA. Based on this finding, the ALJ ordered the District to reimburse the Parents $26,788.32 of the more than $100,000 they had sought toward the cost of placing their son at a private school in Chicago. In their action for judicial review, the Parents claim that the ALJ erred in failing to award them the full cost of private school placement, as well as related travel expenses they incurred and attorney's fees. The District, on the other hand, challenges the ALJ's finding that it violated the Parents' procedural rights and claims they are entitled to no relief whatsoever. The case is presently before the court on the Parents' motion for judgment on the administrative record and the District's motion for summary judgment. For the reasons stated below, the Parents' motion will be denied and the District's motion will be granted.

BACKGROUND

Joel Hjortness, who was born on August 27, 1990, is an exceptionally bright student with an IQ of 140. (IEP Meeting, Disc # 1, Track 18.) However, he has disabilities that manifest themselves in a wide range of problem behaviors that interfere with his learning and the learning of others. At various times, he has been diagnosed with obsessive compulsive disorder, Tourette's disorder, attention deficit/hyperactivity disorder, autistic spectrum disorder, oppositional defiant disorder, and anxiety disorder. (Decision of Administrative Law Judge William J. Coleman, Jr.,

dated May 6, 2005 ¶ 3.) In August 2003, an examining psychiatrist described him as "a child with a complex neuropsychiatric disturbance that compromises his ability to self regulate his attention and concentration, suppress irrelevant perseverance ideation and to defuse and divert antisocial/inappropriate impulses." (*Id.*) A teacher who was involved with Joel during the latter half of 2003 described him as having "significant deficits in the area of social communication." (*Id.*)

Joel and his parents reside in the area served by the Neenah Joint School District. Until May 2003, Joel attended public schools in the District. Joel was in the seventh grade during the 2002-2003 school year. He maintained a grade point average of 3.5 as a regular education student at the Shattuck Middle School and was on the honor roll for the three quarters he completed. (Decision ¶ 2.) However, in May 2003, Joel's parents withdrew him from Shattuck because they believed the District was not adequately addressing Joel's behaviors that were manifestations of his disabilities. His parents thereafter enrolled him in the Kennan Academy in the Menasha area until January 2004, when they enrolled him as a residential student at the Sonia Shankman Orthogenic School (SSOS) in Chicago, Illinois. (Decision ¶ 1.) SSOS is a coeducational residential treatment program for children in need of support for behavioral and emotional issues. Its academic program employs small class sizes taught by certified special education teachers. Students live in dormitories in groups of up to seven students, in

which at least one counselor is present at all times.[1] (Decision ¶ 10.)

On November 13, 2003, the District offered to complete a three-year reevaluation of Joel as required by law. (Decision ¶ 5.) An initial meeting to discuss testing to be used in the evaluation was set for January 14, 2004, but was postponed at the Parents' request so that personnel from SSOS could be present. Ultimately, however, it appeared SSOS representatives were unable to be present and instead District personnel visited SSOS. On March 12, 2004, a school psychologist, an occupational therapist, and an autism resource teacher from the District visited SSOS to observe Joel and to interview staff who had worked with him. (*Id.* ¶¶ 11-13.) At a March 19, 2004, Multi-Disciplinary meeting, based in part on this observation, as well as the results of other tests that had been preformed, the reevaluation team concluded the Joel met the special education criteria for autism and other health impairment (OHI) (*Id.* ¶ 15.) The team also concluded that Joel met the educational criteria for emotional behavioral disability (EBD) (*Id.* ¶ 16.) However, because of the Parents' objections, the District chose not to identify EBD as an additional disability.

Having reevaluated Joel, the District was next tasked with developing an individualized education plan (IEP) for him. The IEP team meeting convened on April 22, 2004. The team included the District's special education director, one regular education teacher each from Neenah High School and Shattuck Middle School, one special education teacher each

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[1] It appears, however, that SSOS also offers day programs to some students. (Docket # 13 at 129.)

from those same schools, an OHI consultant, and the three district staff members who had visited SSOS. (Decision ¶ 21.) Joel's mother attended the meeting with her attorney. After discussing Joel's strengths and weaknesses, the parties proceeded to discuss, in general terms, goals and short-term objectives for Joel's education. While the parties did identify one specific goal-namely, that Joel would raise his hand at least 50% of the time when appropriate-no other specific goals or short-term objectives were identified at the IEP team meeting. (*Id.* ¶ 24-25.) All the participants agreed that Joel needed instruction at a small group setting; however, the District declined to specify how many students "small" entailed, despite Joel's mother's request for clarification. (*Id.* ¶¶ 27-28.) Joel's mother also indicated that she believed Joel needed extended school year (ESY) services to avoid regression in his social skills. The District did not consider such services for the summer of 2004, but indicated a willingness to revisit the issue upon receiving additional baseline information about Joel from SSOS. (*Id.* ¶ 30.)

After the IEP meeting, District staff who were members of the IEP team prepared the IEP for the period May 17, 2004, through May 16, 2005. The IEP specified four goals. Only the first of these-use of appropriate hand raising procedures 50% of the time-had been specifically addressed at the IEP meeting. (Decision ¶ 33.) The short-term objectives in support of these goals were, for the most part, derived from Joel's previous IEP and were not discussed at the IEP meeting. (*Id.* ¶ 34.) The District sent the IEP and formal notice of placement of Joel at Shattuck Middle School, effective May 17, 2004, to the Parents on April 30, 2004. (*Id.* ¶¶ 42-43; *see also* Exs. 515-516.) On May 4, 2004, the Parents formally rejected the

placement offer. (Ex. 518.) By letter dated May 6, 2004, the Parents stated that the IEP did not address their concerns, and asked the District to reconsider placing Joel at SSOS. The Parents stated that if the District was unwilling to modify the IEP to address their concerns, they would keep Joel at SSOS and seek reimbursement for the cost of his education there. (Ex. 517.) The District did not formally respond to this letter. On June 18, 2004, the Parents filed a request for a due process hearing to seek reimbursement for placing Joel at SSOS. (Decision ¶ 44.)

The due process hearing was originally scheduled for August 30, 2004, but the hearing dates were vacated at the request of the Parents so that they could seek review of the order of the ALJ denying the request of their out-of-state attorney, Stephen Walker, to represent them pro hac vice in the State proceedings. ALJ William Coleman of the Wisconsin Department of Hearings and Appeals entered an order denying Attorney Walker's request on July 21, 2004, on the ground that hearing officers appointed to conduct due process hearings under Wis. Stat. § 115.80 are not authorized to permit non-resident attorneys who are not members of the Wisconsin Bar to engage in the practice of law in Wisconsin. However, ALJ Coleman noted that the denial of Attorney Walker's request would not prevent him from accompanying the parents to the hearing and advising them in the capacity of a person "with special knowledge or training with respect to the problems of children with disabilities," as permitted under Wis. Stat. § 115.80(3), 20 U.S.C. § 1415(h)(1), and 34 C.F.R. § 300.509(a)(1). It appears Attorney Walker did not seek further review of ALJ Coleman's

ruling at that time, and the hearing was finally set for January 2005.

On January 11, 2005, a due process hearing commenced before ALJ Coleman, and after five days of testimony, was completed on February 25, 2005. Briefing was completed on April 8, 2005, and ALJ Coleman rendered his decision on May 6, 2005. He found that the IEP was "objectively reasonably calculated to provide [Joel] with a free appropriate public education in the least restrictive context" and that Joel did not require ESY services to receive a free appropriate public education. (Decision at 19-22; ¶¶ 45, 46.) ALJ Coleman also found, however, that the IEP team had not substantially developed the IEP, nor held the IEP meeting, before it decided to place Joel in the District's schools. (*Id.* at 16-19; ¶¶ 47-48.) He held that this denied the Parents meaningful participation in the IEP process. (*Id.*) ALJ Coleman also found that the District's failure to discuss three of the four goals, or any of the short-term objectives, in detail at the IEP meeting "denied the parents meaningful participation in development of this essential component of the IEP process." (*Id.* at 17.) He held that in light of the fact that the goals and objectives were drafted after the IEP meeting, the District should have offered to reconvene the IEP meeting to discuss them. (*Id.*)

ALJ Coleman held that the premature placement determination and the failure to discuss goals and objectives specifically at the IEP meeting or thereafter constituted procedural violations of the IDEA that denied Joel a free and appropriate public education. (Decision at 17, 19, 22.) As a remedy for these violations, he ordered the District to reimburse the Parents $26,788.32, or 80% of the cost of annual

tuition at SSOS of $33,485.40. ALJ Coleman reduced tuition reimbursement by 20% because he concluded that the Parents had not shown ESY services for the summer of 2004 to be necessary. He also found the evidence insufficient to establish that a residential placement at SSOS was necessary to give Joel a free and appropriate public education and therefore denied reimbursement of those expenses attributable to room and board.[2] (Decision at 22.)

ANALYSIS

Whether the District has satisfied the requirements of the IDEA is a mixed question of law and fact. *Murphysboro v. Ill. State Bd. of Educ.*, 41 F.3d 1162, 1166 (7th Cir.1994). On issues of law, the ALJ is entitled to no deference. *Dale M. ex rel. Alice M. v. Board of Educ.*, 237 F.3d 813, 817 (7th Cir.2001). On issues of fact, however, the district court must accord "due weight" to the ALJ's decision. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982). The party challenging the ALJ's factual findings bears the burden of proof. *Heather S. v. State of Wisconsin*, 125 F.3d 1045, 1052 (7th Cir.1997). In deciding whether the challenging party meets that burden, the district court "(i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(B). "[W]here[, as here,] the district court does not take new evidence and relies solely on the administrative record, it owes considerable

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[2] Apparently Joel is attending a public school outside the Neenah Joint School District during the 2005-2006 school year (Parents' Resp. at 3), though no specificity is provided.

deference to the hearing officer, and may set aside the administrative order only if it is 'strongly convinced that the order is erroneous.' This level of review is akin to the standards of clear error or substantial evidence." *Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist. # 221*, 375 F.3d 603, 611-612 (7th Cir.2004) (quoting *School Dist. v. Z.S.*, 295 F.3d 671, 675 (7th Cir.2002)).[3]

The IDEA requires the District, as a recipient of federal education funds, to provide children with disabilities a free appropriate public education (FAPE) in the least restrictive environment. 20 U.S.C. § 1412(1). A FAPE is an education that is "specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Murphysboro*, 41 F.3d at 1166 (quoting *Rowley*, 458 U.S. at 189). The District is not required, however, to educate each handicapped child to his or her highest potential. *Id.*

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[3] The Parents have moved to strike the District's motion for summary judgment or, in the alternative, to treat it as one for judgment on the administrative record. (Docket # 26.) The District, by contrast, claims that it is the Parents' motion that is inappropriately titled. (Docket # 29 at 2-3.) The court declines to join the argument over semantics. As the Seventh Circuit has explained, "the term 'summary judgment' in the context of an IDEA case has a different meaning than it has in a typical Rule 56 motion." *Alex R.*, 375 F.3d at 611. Under the IDEA, "[t]he motion for summary judgment is simply the procedural vehicle for asking the judge to decide the case on the basis of the administrative record." *Heather S.*, 125 F.3d at 1052 (quoting *Hunger v. Leininger*, 15 F.3d 664, 669 (7th Cir.1994), *cert. denied*, 513 U.S. 839 (1994)). That being said, the court will deny the parents' motion to strike.

The cornerstone of the IDEA is the development and implementation of the IEP *Honig v. Doe*, 484 U.S. 305, 311 (1988).20 U.S.C. § 1414(d)(1)(A)(i) sets forth the required components of an IEP, which include

(I) a statement of the child's present levels of academic achievement and functional performance, including-

(aa) how the child's disability affects the child's involvement and progress in the general education curriculum;

* * *

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to-

(aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child's other educational needs that result from the child's disability;

(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use

of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided.

* * *

See also 34 C.F.R. §§ 300.347. Parents have the right to be members of "any group that makes decisions on the educational placement of their child," 20 U.S.C. § 1414(f), including the team that produces the IEP. 20 U.S.C. § 1414(d)(1)(B). School districts are responsible for ensuring that parents are afforded an opportunity to participate at each IEP meeting. 34 C.F.R. § 300.345(a).

In evaluating an IEP under the IDEA, the court must consider whether "(1) the school district followed the IDEA's procedures and (2) the IEP is reasonably calculated to enable the child to receive educational benefits [i.e., to receive a free and appropriate public education]." *Alex R.*, 375 F.3d at 613. When a district produces a substantively flawed IEP-that is, an IEP that does not enable the student to receive a free and appropriate public education-the district has violated the IDEA and the student and his parents are entitled to relief, which may include the costs of an appropriate private placement. *Florence County Sch. Dist. Four v. Carter by and through Carter*, 510 U.S. 7, 15 (1993). Generally, procedural flaws only entitle the parents to relief when they result in the loss of educational opportunity. *Heather S.*, 125 F.3d at 1059.

As an initial matter, the District challenges ALJ Coleman's holding that any procedural violations of the IDEA that infringed the Parents' opportunity to participate in the IEP formulation process resulted in the denial of a free and appropriate public education to Joel. In *Heather S.*, the Seventh Circuit approv-

ingly cited the Ninth Circuit's holding in *W.G. v. Bd. of Trustees*, 960 F.2d 1479 (9th Cir.1992), that

> [p]rocedural flaws do not automatically require a finding of a denial of a [free and appropriate public education]. However, procedural inadequacies that result in the loss of educational opportunity . . . clearly result in the denial of a [free and appropriate public education].

Id. at 1484. In the omitted portion of the quotation, the Ninth Circuit went on to say that procedural inadequacies that "seriously infringe the parents' opportunity to participate in the IEP formulation process" also result in the denial of a free and appropriate public education. *Id.* The District correctly points out that the Seventh Circuit has never explicitly adopted this language from W.G. In fact, in *Evanston Community Consol. Sch. Dist. No. 65 v. Michael M.*, 356 F.3d 798, 804 (7th Cir.2004), the Court declined the parents' request that it "adopt the rest of the W.G. language," finding instead that "[t]he record does not support a finding that the parents' rights were in any meaningful way infringed." *Id.* Thus, at the time the ALJ issued his decision, it was an open question in this Circuit whether a procedural violation that seriously infringes the parents' opportunity to participate in the IEP formulation process constitutes the denial of a FAPE, even if the court can otherwise conclude that the resulting IEP is appropriate.[4]

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[4] Effective July 1, 2005, Congress amended the IDEA to specifically provide that a hearing officer may find that child did not receive a FAPE on the basis of a procedural violation if the violation "significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the pro-

The proposition that serious infringement of parents' opportunity to participate in the IEP formulation process can amount to a denial of a free and appropriate public education is well-supported, however, by case law from other circuits, *see, e.g.*, *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir.1990); *Hall by Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir.1985), and by regulations adopted by the Department of Education. *See* 20 U.S.C. § 1415(f)(3)(E)(ii) ("In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies . . . significantly impeded the parents' opportunity to participate in the decisionmaking process. . . ."). Supreme Court precedent also provides implicit support. *See Rowley,* 458 U.S. at 205-206 ("It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard."). In light of this authority and given Congress' recent amendments of IDEA, this court does not question the ALJ's conclusion that procedural inadequacies that seriously infringe the parents' opportunity to participate in the IEP formulation process can result in the denial of a free and appropriate public education to the child.

The question, however, is whether such inadequacies are present in this case. ALJ Coleman found that they were in two respects-first, the District's

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vision of a free appropriate public education to the parents' child." 20 U.S.C. § 1415(f)(3)(E)(ii)(II).

arguably premature determination of Joel's placement, and second, the District's failure to reconvene the IEP team after it formulated the goals and objectives outside the presence of the Parents. With respect to the former supposed inadequacy, the court cannot reconcile ALJ Coleman's ruling with his other findings and with the requirements of the IDEA. The IDEA required the District to mainstream Joel to the maximum extent appropriate:

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A). Pursuant to this provision, the District "must ensure that '[Joel] is educated in the school that he . . . would attend if nondisabled' unless [Joel's] educational program 'requires some other arrangement.'" *Casey K. ex rel. Norman K. v. St. Anne Community High School Dist. No. 302*, 400 F.3d 508, 512 (7th Cir.2005) (quoting 34 C.F.R. § 300.552). In other words, the District had no obligation to consider placing Joel at SSOS unless and until it concluded that he could not receive a free and appropriate public education in district schools. *See* 20 U.S.C. § 1412(a)(10)(C)(i) ("[T]his subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a

private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility."); *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir.1991) ("[I]f there is an appropriate public school program available, i.e., one reasonably calculated to enable the child to receive educational benefits, the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child. . . . In short, the inquiry as to the appropriateness of the State's program is not comparative.") (internal quotation marks and citations omitted). The District determined, and the ALJ found, that Joel could receive a free and appropriate public education in district schools. (Decision at 22.) Having so concluded, the District was entitled to draft an IEP that assumed Joel would be educated in the District's schools, and was not required to consider placement at SSOS. *Hampton Sch. Dist. v. Dobrowolski*, 976 F.2d 48, 54 (1st Cir.1992) (holding that determining placement before drafting of IEP did not violate IDEA).

ALJ Coleman also faulted the District because discussion of goals and short-term objectives at the IEP meeting never got beyond "general terms," with one exception (Joel's hand-raising techniques). (Decision ¶ 24.) ALJ Coleman found that "no specific short term objectives were identified at the IEP meeting, though the extended discussion and the information before the team provided information from which to develop appropriate short term objectives." (Decision ¶ 25.) Because there was little discussion of specific goals or short-term objectives at the IEP meeting, "the drafters of the IEP were left to devise their own, without the input of the other

members of the IEP team, including, most significantly, the Parents."[5] (Decision at 17.) ALJ Coleman held that the District should have reconvened the IEP team for the purpose of discussing the goals and short-term objectives when it tendered the IEP and formal offer of placement to the Parents. (*Id.*)

But it is one thing to say that the District should have reconvened the IEP team to further discuss goals and short-term objectives; it is quite another to say that the Parents were denied an opportunity to participate in the process of formulating the IEP to such an extent that Joel was denied a FAPE. The record in this case, which includes a recording of all but the last fifteen minutes of the IEP meeting, demonstrates that the District did not deny the Parents an opportunity to participate in the IEP process. On several occasions in the course of the two-and-a-half hour meeting, members of the team attempted to focus on the task of setting specific goals and objectives. Joel's mother, along with her attorney, was part of that process and was specifically asked for her input. Rather than suggest goals and short-term objectives she wanted included in the IEP, Joel's mother made clear to the team that she did not believe the District could provide her son an appropriate education. In her view, "the issue on the table [was whether the District would] pay for him to be at Sonia Shankman where he needs to be. . . ."

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[5] ALJ Coleman found that "[t]he conclusion is inescapable that the drafters of the IEP, knowing that the placement determination was for a small group setting in the District schools, endeavored to craft goals and short term objectives that fit this placement determination." (Decision at 17.) However, he also determined that the goals and short-term objectives were "objectively reasonable." (*Id.i* at 20.)

(Ex. C, Disc # 2, Track 5.) Despite her view that the District was unable to meet her son's needs, the team continued to discuss the efforts it was willing to undertake in order to provide Joel an appropriate education. They offered to revisit the IEP once the anticipated evaluation from SSOS was received or if problems surfaced in the course of the year. They also offered to meet with the Parents to discuss any changes they thought appropriate. Moreover, upon receipt of the completed IEP, Joel's mother did not complain that the goals and short-term objectives had not been adequately discussed or request additional ones be added. Her cryptic letter simply stated that "the IEP you proposed does not address the concerns we have repeatedly raised." (Ex. 517) She asked the District to reconsider placement at SSOS and stated that if the District was unwilling to modify the IEP and address "the concerns we have previously raised," she would look elsewhere, including SSOS for placement for her son. (*Id.*)

In the face of this record, the court cannot accept the ALJ's finding that the District seriously infringed the Parents' opportunity to participate in the IEP formulation process.[6] None of the cases cited by the Parents support their contention that a failure to complete the IEP at the meeting constitutes a denial of procedural rights of such a magnitude that

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[6] In truth, because the underlying facts are essentially undisputed, the ALJ's assertion that the District denied the parents their right to meaningful participation in the development of the IEP is a conclusion of law, rather than a finding of fact to which this court would owe substantial deference. "On issues of law, the hearing officer is entitled to no deference." *Alex R. v. Forestville Valley Community Unit School Dist.*, 375 F.3d 603, 611 (7th Cir.2004).

reimbursement for private school placement is required, even where the IEP that was proposed is found to be appropriate. "It is permissible for one person to draft the IEP as long as the parents are not denied the opportunity to participate, and the members of the IEP team have an opportunity to discuss and amend the IEP." *Hampton School Dist. v. Dombrowolski*, 976 F.2d 48, 54 (1st Cir.1992). While procedural violations that seriously impair the parents' opportunity to participate in the formulation of the IEP may result in the denial of a free and appropriate public education, no such violation occurred here. The Parents' remaining procedural challenges to the IEP fare no better. The Parents contend, for example, that the District violated the IDEA by failing to invite Joel's present teacher and other personnel from SSOS to the IEP meeting so that an accurate determination could be made as to Joel's present level of educational performance. As a result, they claim that the IEP is deficient in that it does not reflect Joel's present level of performance in relation to the annual goals and objectives. But as the ALJ pointed out, a school district is required to insure that a representative of a private school attends the IEP meeting only if the school district placed the child in the private school. 34 C.F.R. § 300.349. "There is no corresponding requirement that a school district insure the attendance or participation of a representative of a private school in which a parent has unilaterally placed a child with a disability." (Decision at 14.) (emphasis original). In any event, the record reflects that the District made every effort to insure input from SSOS. It sent three representatives to SSOS to meet with staff and observe Joel. It offered the Parents alternative meeting dates in an effort to allow the Parents to

invite SSOS to attend or participate by telephone. Team members also repeatedly spoke of their interest in SSOS's evaluation and report, which they hoped to have available by the time of the hearing. The District cannot be faulted for failing to secure additional input from SSOS. And while updated information from SSOS may have been helpful in assessing Joel's present level of educational performance, the ALJ concluded that the absence of such information "would not lead to the denial of a free appropriate public education." (Decision at 20.)

The Parents also claim that the formal notice of placement prepared by the District was legally deficient in that it failed to explain why the District was proposing a placement in the Neenah School District and what other options it had considered. A State statute and a federal regulation require that the notice provided to the parents state such information. Wis. Stat. § 115.792(2); 34 C.F.R. § 300.503. The District argues that when considered with the IEP which accompanied the notice, the Parents were provided the required information. The court agrees. The ALJ correctly concluded that this was at most a technical violation that did not affect the substantive rights of the Parents.

Lastly, the Parents claim that the ALJ erred in denying the request of their out-of-state attorney to represent them *pro hac vice* pursuant to Supreme Court Rule (SCR) 10.03(4). As noted above, ALJ Coleman denied Attorney Walker's request on the ground that a hearing officer lacks the authority under SCR 10.03(4) to permit an out-of-state attorney who is not a member of the Bar to practice law in the State. In support of his decision denying Attorney Walker's request, the ALJ cited *Seitzinger v.*

Community Health Network, 2004 WI 28, 676 N.W.2d 426 (Wis.), in which the Wisconsin Supreme Court affirmed the circuit court's decision denying the request of an attorney not licensed in the State of Wisconsin to represent his physician client at a hospital peer review hearing to review the revocation of his staff privileges. *Seitzinger* is not altogether persuasive, however, since it rested on the construction of the hospital's by-laws that were at issue in that case and, in addition, a presiding officer in a hospital peer review hearing over revocation of a physician's staff privileges bears little resemblance to an ALJ presiding over a statutory due process hearing under Wis. Stat. § 115.80. Given the broad definition of the term "judge" in SCR 60.01(8) ("anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions"), the Parents' argument that ALJ Coleman erred in concluding he lacked such authority is not without merit. But the court finds it unnecessary to resolve this uncertain issue of state law. Attorney Walker did appear with the Parents at the due process hearing and functioned as their attorney in all but name. The only effect of the ALJ's ruling denying his request to represent the Parents *pro hac vice* is that it meant they could not recover attorneys fees for his services if they prevailed. But since under this court's analysis they do not prevail in any event, the issue is moot. Accordingly, the court need not decide this issue.

CONCLUSION

In conclusion, the Parents' motion to strike the District's motion for summary judgment is denied. The court grants the District's motion and reverses that portion of the ALJ's decision finding that the

District seriously infringed the Parents' opportunity to participate in the formulation of the IEP for their son and thereby denied him a free and appropriate public education. In all other respects, the findings and conclusions of the ALJ are affirmed. It follows that the Parents' request that the District be ordered to reimburse them for the costs of private school tuition and related expenses at SSOS must be denied and the action dismissed. The clerk is directed to enter judgment in favor of the District in accordance with this decision.

SO ORDERED.

APPENDIX C

Before The
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS

Case No.: LEA-04-019

In the Matter of the Due Process Hearing on behalf of
JOEL HJORTNESS, by and through his Parents,
ERIC and GAIL HJORTNESS,
Petitioners,

and

NEENAH JOINT SCHOOL DISTRICT,
Respondent.

DECISION

The Parties to this proceeding are as follows:

Joel Hjortness, by
Eric and Gail Hjortness
1965 Oakview Drive
Neenah, Wisconsin 54956,
with assistance from,
Stephen Walker
23245 Fairmont Blvd.
Beechwood, Ohio 44122

Neenah Joint School
District, by Attorney
Lori Lubinsky
Axley Brynelson LLP
P.O. Box 1767
Madison, Wisconsin
53701-1767

On June 18, 2004, the Department of Public Instruction received a request for a due process hearing under Subchapter V, Chapter 115, Wis. Stats., and the federal Individuals with Disabilities Education Act (IDEA), by Eric and Gail Hjortness (the "Parents") on behalf their son, Joel Hjortness (the "Stu-

dent"). The Parents asked that the Neenah Joint School District (the "District") either provide a free appropriate public education ("FAPE") for the Student "or to pay the costs of placement at Sonia Shankman Orthogenic School, including the costs of transportation."

The due process hearing was originally scheduled to commence on August 30, 2004, but the hearing dates were vacated at the request of the Parents, and without objection by District, as the Parents sought review of the order of the Division of Hearings and Appeals (the "Division") dated July 21, 2004 that denied a motion to permit out of state counsel, Mr. Stephen Walker, to appear in these proceedings *pro hac vice* as counsel for the Parents. In the order of July 21, 2004, the Division noted that the denial of the application "would not preclude Mr. Walker from accompanying and advising the [Parents] at the due process hearing in the capacity of an individual 'with special knowledge or training with respect to problems of children with disabilities'," as permitted by Wis. Stat. § 115.80(3), 20 U.S.C. § 1415(h)(1), and 34 C.F.R. § 300.509(a(1). In a scheduling order dated September 9, 2004, further scheduling of the hearing continued to be deferred until November 12, 2004, to allow counsel for the Parents to continue seeking review of the July 21, 2004 order.

By scheduling order dated November 12, 2004, the Division scheduled the due process hearing to commence on January 11, 2005, and reiterated that Mr. Walker could appear in the proceedings to assist the Parents in the capacity of a person "with special knowledge or training with respect to problems of children with disabilities." The hearing was held in the offices of the District on January 11, 12, 13, and

14, 2005. The hearing was continued at the offices of the District on February 23, 2005, and concluded with a telephone conference on the record on February 24, 2005, with counsel for the District and Mr. Walker participating throughout the hearing. Pursuant to an agreed briefing schedule, the Parties filed and served simultaneous principal and responsive posthearing briefs, with the responsive briefs being filed on April 8, 2005.

The issues identified for the due process hearing were specified in a statement of issues filed on behalf of the Parents, which when viewed in context with the evidence adduced at the due process hearing and the arguments advanced in support of relief in the post-hearing briefs filed on behalf of the Parents, are restated as follows:

> Whether the IEP team that developed the 2004-2005 IEP was improperly constituted because it lacked a representative from the Student's existing school (the Sonia Shankman Orthogenic School). (Enumerated issue 6).
>
> Whether the 2004-2005 IEP is inappropriate because the District had failed to adequately identify the Student's disabilities and his resultant needs. (Enumerated issues 1 and 4).
>
> Whether the 2004-2005 IEP and placement was procedurally deficient because the short term objectives for the 2004-2005 IEP were crafted after the IEP team had met and had determined that the appropriate placement would be in the District schools. (Enumerated issue 1).
>
> Whether the District's placement decision under the 2004-2005 IEP was procedurally de-

ficient because the IEP team refused to consider the Parent's desired placement at the Sonia Shankman Orthogenic School as an appropriate placement. (Enumerated issue 6).

Whether the 2004-2005 IEP and offer of placement failed to provide the Parents with sufficient prior written notice of the District's actions. (Enumerated issue 2).

Whether the 2004-2005 IEP was substantively inappropriate because it lacked (a) sufficient present levels of educational performance, (b) sufficient or appropriate goals and short term objectives, (c) adequate related and support services, including an adequate behavioral intervention plan, and (d) physical education or adaptive physical education. (Enumerated issues 1, 3 and 5).

For the reasons set forth below, the request for reimbursement the expenses of the Parents' private school placement at Sonia Shankman Orthogenic School is granted in part.

Findings of Fact

Background

1. Eric and Gail Hjortness (the "Parents") are the parents of Joel Hjortness (the "Student"), whose date of birth is August 27, 1990. The Parents reside in the area served by Neenah Joint School District (the "District"). The Student had attended public schools in the District until he was withdrawn by his Parents in May 2003. The Parents enrolled him in the Kennan Academy, located in the Menasha area, in May 2003, where he continued to receive his education until January 2004, when the Parents enrolled

him as a resident student at Sonia Shankman Orthogenic School ("SSOS") in Chicago, Illinois, where to date he has continued to receive his education.

2. Before he was withdrawn from the District schools in May 2003, the Student's placement under an IEP for the 2002-2003 school year had been in the District schools at Shattuck Middle School, where he was involved full-time in the general curriculum for the seventh grade. The Student had received educational services wholly in the regular education classroom, and had maintained B+ to A level work in his core classes, though inconsistency in his speed and organization of work has sometimes prevented him from consistently performing at above-average levels in daily contexts. The Parents withdrew him from the District schools principally because they believed the District was not appropriately addressing the Student's behaviors that were manifestations of his disabilities.

3. The Student has disabilities that manifest themselves in a wide range of problem behaviors that interfere with his learning and the learning of others. The Student has been diagnosed at various times with a number of different disorders, specifically, obsessive compulsive disorder, Tourette's disorder, attention deficit/hyperactivity disorder, autistic spectrum disorder, oppositional defiant disorder, and anxiety disorder. In August 2003, an examining psychiatrist described him to be "a child with a complex neuropsychiatric disturbance that compromises his ability to self regulate his attention and concentration, suppress irrelevant perseverance ideation and to defuse and divert antisocial/inappropriate impulses." (Ex. 509, p. 1022). An educator who was involved in his education at the Kennan Academy

where he was educated for latter half of 2003 described him to have "significant deficits in the area of social communication." *Id.*

4. In May 2003 the Parents filed a due process hearing request that challenged in part the appropriateness of an IEP designed for the period May 23, 2003 to May 22, 2004, and wherein their principle request was for reimbursement for private school tuition for the 2003-2004 school year. In a decision dated November 3, 2003, the Division of Hearings and Appeals determined the IEP to provide a free appropriate public education and denied the request for tuition reimbursement. Division of Hearings and Appeals, Case No. LEA-03-019.

Three-Year Reevaluation in 2004

5. By letter to the Parents dated November 13, 2003, the District offered to complete a three-year reevaluation of the Student, as required by law. Following a series of communications, the Parents accepted the offer for reevaluation. The District sent the Parents a formal written notice of reevaluation dated December 23, 2003, which had the effect of triggering a 90-day statutory period in which to complete the reevaluation.

6. The District scheduled an IEP team meeting for January 14, 2004, to discuss the proposed testing, but the meeting was canceled at the Parents' request so that they could arrange for the participation of certain medical and educational professionals to participate either in person or by telephone. The District asked that the Parents contact the District as soon as possible to reschedule the meeting.

7. The Parents did not contact the District to reschedule the January 14, 2004, meeting, so the

evaluation team proceeded to determine what additional testing of the Student would be necessary. By letter dated January 29, 2004, the case manager for the Student's reevaluation provided the Parents with a summary of the types of assessment techniques recommended by the evaluation team. The case manager invited the Parents' response to the proposed plan and asked for suggestions to the plan. The case manager also outlined the meetings the Parents could expect to occur as a result of the three-year reevaluation process. After receiving this letter, the Parents requested a meeting to discuss the proposed testing. The District then scheduled a meeting for February 26, 2004, to "review existing information and determine [the] need for additional tests or other evaluation materials." This meeting was held as scheduled, though the Parents did not bring with them any of the experts or professionals they had indicated earlier that they had wanted to attend, which was the reason for canceling the original January 14th meeting.

8. In the meeting on February 26, 2004, the team identified the proposed testing to be conducted. The team decided to assess whether the Student continued to meet the educational criteria for other health impaired ("OHI"), as well as whether he met the educational criteria for autism and emotional behavior disabilities ("EBD"), though the Parents did not concur in the need to assess for EBD. The team determined further to send team members to the Sonia Shankman Orthogenic School ("SSOS") in Chicago to conduct observations, meet with the Student, and obtain information from SSOS as part of the reevaluation.

9. The District was required by law to complete the reevaluation by March 18, 2004. The District had asked the Parents to allow the District an extension of time in which to complete the reevaluation, but the Parents did not agree to an extension. The District then requested that the Department of Public Instruction grant the District an additional 90 days to complete the reevaluation. By letter dated March 11, 2004, the DPI granted an extension of 45 days, to May 3, 2004.

10. The SSOS is a coeducational residential treatment program for children in need of support for behavioral and emotional issues. Its self-described primary mission is to provide "intensive milieu therapy for students with disturbed emotions who are in residential care at the school." (Exhibit A-1, p.4). Its academic program employs small class sizes taught by certified special education teachers. In the residence, the students live in dormitories, in dorm groups of up to seven students, during which at least one counselor is present at all times.

11. On March 12, 2004, three members of the IEP team (a school psychologist, an occupational therapist, and an autism resource teacher) visited SSOS to observe the Student and to collect information. Two of them observed the Student in a science class, and afterward the teacher of the class told them that the Student's behavior in class was fairly typical. Team members attempted to speak with the Student individually at separate times but the Student ignored or was largely non-communicative with them.

12. The District's autism resource teacher provided an SSOS teacher and a residence counselor with a survey for the Asperger Syndrome Diagnostic Scale, and provided the residence counselor with a

survey for the Australia Scale for Asperger Syndrome, which they completed for the District. (The Parents completed the same surveys at the District's request.) The survey results reflected difficulties with social participation, communication skills, thinking differences, and behavioral expectations.

13. The District team formally interviewed a social worker, an administrator who supervised the Student's residential life, one of his classroom teachers, and a school administrator. These SSOS staff members reported the following information:

a. The Student resents a number of the standard rules in the dorm.

b. The Student is expected to follow a few very basic rules in the classroom setting, but requires frequent reminders about these rules. Violations of these rules occur both when the Student is under stress and also when tension appears minimal.

c. The Student needs a predicable routine in his schedule and is more likely to exhibit behavioral problems when unexpected events are included in his day.

d. The Student is confused and unskilled in social dynamics, rather than intending to promote conflict. He fails to recognize social cues in others, uses inflammatory, judgmental, or intolerant language, and tends not to be forgiving of others. He exhibits rigidity in thinking during conflicts, and finds it difficult to consider alternative views about an issue, often demanding that others adopt his views and beliefs.

e. The SSOS staff have had to develop a relationship with the Student before he becomes responsive to their directions.

f. When the Student has his most explosive behavior reactions in the dorm, he calms most successfully when he is directed to spend quiet time alone, where he can regroup and then later return to his peers.

g. The Student has difficulty finding appropriate responses to others when he perceives them to have done something to provoke him.

14. The reevaluation meeting was held on March 17, 2004. Among the conclusions of some of the IEP participants who prepared reports for the meeting were: triggers to unwanted behaviors included "excitement, competitive situations, transitions, stress, frustration, feelings of inadequacy and believing his needs are not being met" (Ex. 509, p. 1041); that interventions that have been successful included providing him 'safe place' to go, redirecting his attention, defusing tension with humor, use of positive statements, providing choices, walking when agitated, compromise, ignoring minor disruptive behavior, and foreshadowing transitions (*id.*); the Student "has profited from immediate feedback when target and off-target behaviors appear" with "feedback that specifically describes the positive and negative behaviors in the most objective and measurable ways" (Ex. 509, p. 1039); that "educational programming continue to focus on shaping the behavioral skills which he needs to participate effectively and positively in instruction" and that "other essential components of his education include methods of preventing behavioral outbursts, and facilitating de-escalation at times when outbursts do

occur" (Ex. 509, p. 1045); and that "an active, large and quickly paced classroom may not be an appropriate fit" because "in these situations he has fallen behind and becomes frustrated," so that consequently the Student "may need individual and small group instruction to enhance learning opportunities and experience success" (Ex. 509, p. 1039).

15. The reevaluation team determined that the Student met the special educational criteria for autism and other health impairment (OHI). The team had before it information that included past diagnoses of obsessive compulsive disorder (OCD), Tourette's disorder, attention deficit hyperactivity disorder (ADHD), autistic spectrum disorder, oppositional defiant disorder (ODD), and depressive disorder, though the various diagnoses and evaluations reflected diverse conclusions as to the disorders present.

16. The consensus of the reevaluation team was that the Student also met the educational criteria for emotional behavioral disability (EBD). The Parents voiced strong disagreement with this conclusion, and as a result, the District chose not to identify EBD as an additional disability despite its conclusion to the contrary.

17. The District and the Parents both describe the Student's needs as being in the area of social skills. He exhibits a wide range of symptoms that reflect serious and chronic problems in social contexts. Problem areas include overstepping physical and social boundaries, acknowledging and following direct and indirect requests, noticing and accurately interpreting nonverbal cues/body language, using an appropriate tone of voice, frustration tolerance, interruptions, self-evaluation, recognizing the impact

of his behavior on others or the consequences of that behavior, and conduct in competitive situations. He engages in frequent demanding, argumentative, stubborn, and angry behaviors. In the realm of "attention problems," he displays episodes of impulsivity, inattention, and poor concentration. These problem behaviors have led to frequent conflicts with others at school and adversely affect his involvement in the general curriculum.

April 22, 2004 IEP Team Meeting

18. On March 19, 2004 the District identified four potential dates for the IEP team meeting to prepare an IEP and to determine placement. The District recognized that there were other persons that the Parents wished to invite to the meeting, but alerted the Parents that if these persons could not attend or otherwise participate directly, then the team could receive their written comments for consideration. The Student's mother responded that a representative from SSOS had indicated an interest in participating by telephone, and that she was coordinating with the representative to determine her availability on any of the four proposed dates. The Student's mother advised further that if the representative was unable to participate by telephone, then the representative might submit written materials for consideration of the team.

19. By letter dated March 24, 2004, the Parents advised the District that staff from SSOS would not be able to participate in the meeting by telephone on the dates proposed. The Parents also informed the District that SSOS would be conducting "autism evaluations this up coming month," which the Parents wished the IEP team to consider, and requested that the District postpone the IEP team meeting

until those evaluations were completed. The Parents concluded that if the District chose not to wait for these expected evaluations from the SSOS, then they would be available to attend an IEP meeting on April 22, 2004. The Parents did not request that an alternative date for the meeting be identified that would enable an SSOS staff member to participate by telephone. The District proceeded and scheduled the IEP team meeting for April 22, 2004.

20. The autism evaluations that the Parents had understood the SSOS was to complete, were not completed until after October 2004, and the District did not receive a copy of the resulting report until December 2004.

21. The IEP team meeting convened on April 22, 2004. The Student's mother attended and was accompanied by her attorney. The team included the District's special education director, one regular education teacher each from Neenah High School (NHS) and Shattuck Middle School (SMS), one special education teacher each from NHS and SMS, one guidance counselor each from SMS and NHS, an OHI consultant from CESA 6 district, and the three District staff members who had visited SSOS the month before (school psychologist, the autism resource staff member who is also a speech language pathologist, and an occupational therapist).

22. The special education director served as the LEA Representative and led the discussion at the meeting. The Student's mother made an audio recording of the IEP team meeting. This recording is of record as District Exhibit C. The recording is approximately two hours and twelve minutes in length, but does not capture the final 10 to 15 minutes of the meeting. The unrecorded part of the

IEP team meeting was in the nature of summation and did not address matters not substantially discussed earlier in the IEP meeting.

23. At the outset of the IEP meeting, the LEA representative stated that the discussion would not be guided by the existing IEP, but rather that the team would start "from scratch."

24. Discussion of specifying annual goals was largely in general terms only. The only specific goal discussed that was later incorporated into the IEP involved usage of appropriate hand raising techniques.

25. Likewise, no specific short term objectives were identified at the IEP meeting, though the extended discussion and the information before the team provided information from which to develop appropriate short term objectives.

26. The final phase of the meeting involved determining the appropriate placement for the Student. At the time of this discussion, specific goals had largely not yet been articulated, and no short term objectives had been crafted.

27. The consensus of the team, including the Student's mother, was that the Student required instruction in a small group setting, though the class size was not defined at the meeting. The LEA Representative expressed the view that the team had enough information to make a placement offer for the 2004-2005 school year at Neenah High School "with modifications in the curriculum." (Ex. C, Disc 2, track 9). The LEA Representative explained that the Student could receive instruction from special education teachers teaching the core subjects in a small group setting with regular education students.

(Ex. C, Disc 2, track 10). The LEA Representative characterized this setting not to be a "regular education setting." (*Id.*). After further discussion regarding whether the District had the resources to construct the described small group classes with regular education students at NHS, the LEA Representative assessed the consensus of the District personnel on the team to be in the affirmative. (Ex. C, Disc 2, Track 11). The LEA Representative noted that the goal over time would be to move away from this small group setting to a "regular education setting if not all of the time, most of the time," (*id.*), but that at the outset the District would place the Student in a small group setting 100% of the day for his core subjects. (Ex. C, Disc 2, Tracks 12-13).

28. The Student's mother asserted that the Student required class sizes of no more than three or four other students. The LEA Representative declined to quantify what the size of the classes would be in the "small group setting" in describing the placement offer at the IEP meeting. (Ex. C, Disc 2, Track 13). The Student's mother demurred, stating that she would not be able to determine whether the placement offer was appropriate if the offer did not include an approximate class size. The LEA Representative advised the Student's mother that the offer of placement would be "at NHS with classes based on his needs in terms of the ninth grade . . . [in the] general curriculum," and that the District "will at this point say it would be special education I believe 100% of the time." (Ex. C, Disc 2, Track 13). The LEA Representative polled the other IEP team members as to whether they agreed that the appropriate placement would be at NHS "with modifications to the curriculum as the setting and that that would be the least restrictive at this point." (*Id.*).

The Student's mother disagreed, while the District staff on the IEP team agreed, with the added comment that there would be direct instruction outside the general curriculum in behavioral strategies and monitoring of the Student's progress. (*Id.*). The Student's mother agreed that the Student required direct instruction in social skills outside the general curriculum. (Ex. C, Disc 1, Track 13).

29. During the IEP team meeting, the Student's mother asked that the District consider SSOS as a placement, and went so far as to define the ultimate issue for the IEP team to be whether the District would pay for the Student to be at SSOS under the IEP being developed. The LEA Representative dismissed this as an appropriate consideration for the meeting, unless it were first determined that IEP could not be implemented in the District schools. Because the IEP team determined that the IEP could be implemented at in the District schools, SSOS was not considered as a possible placement for implementation of the IEP. The LEA representative later stated that having determined that the IEP could be implemented in the District schools, there were no other options to consider. (Ex. C, Disc 2, Track 14).

30. In challenging the placement determination, the Student's mother asserted also that the Student required extended school year (ESY) services. She asserted that the Student requires remediation in social skills that require attention "all year long, every day of the year," and that she expected him to regress without ESY services in social skills. (Ex. C, Disc 2, Track 12). The District did not consider ESY services for the summer of 2004, but indicated that it was willing to revisit the issue upon receiving additional baseline information about the Student that

SSOS was expected to provide at some undetermined later date. (*Id.*).

31. At the close of the IEP meeting, the LEA Representative informed the Student's mother that the District would prepare the IEP and formal placement offer and send it to them by May 3, 2004, which the District understood to be their deadline under the extension for conducting the reevaluation that had been granted by the DPI.

32. A preponderance of the evidence establishes that the District entered the IEP meeting having predetermined that the placement of the Student under the IEP to be developed at the meeting would be in the District schools.

IEP for May 2004 to May 2005

33. After the IEP meeting, some District staff members of the team prepared the IEP for the period May 17, 2004 to May 16, 2005. The IEP specified the following four goals: (a) "[Student] will demonstrate appropriate hand raising procedures 5/10 times in a class," (b) [Student] will increase his ability to follow directions given by authority figures to 50% as measured by teacher monitoring system," (c) [Student] will increase his ability to interpret a situation and respond appropriately in 50% of situations as measured by a monitoring system," and (d) "[Student] will increase his ability to respond appropriately when in competitive situations, 50% of interactions, as measured by staff monitoring system." Of these four goals, only the first was explicitly discussed at the IEP meeting. The remaining three goals are identical to the goals in the 2003-2004 IEP, except that the percentages specified in these three remain-

ing goals were lower than the percentages identified in the preceding IEP.

34. The short term objectives in support of each goal were not specifically discussed or crafted at the IEP meeting. The IEP contains three short term objectives for the "hand raising" goal, two of which are substantially identical to the short term objectives that supported a similar goal in the preceding IEP. Of the five supporting short term objectives for the second goal, four are substantially identical to the corresponding short term objectives in support of the corresponding goal in the preceding IEP, except that the percentages of the expected conduct are lower than those in the preceding IEP. Of the eight short term objectives supporting the third goal, five are substantially identical to the corresponding short term objectives in support of the corresponding goal in the prior IEP, and the remaining three short term objectives are variants of other short term objectives in the preceding IEP. Of the three supporting short term objectives in support of the fourth goal, all are substantially identical to the corresponding short term objectives in support of the corresponding goal in the preceding IEP.

35. At the IEP meeting, the District did not declare or give any indication that the goals and objectives in the IEP being developed would be substantially the same as the goals and objectives contained in the preceding IEP.

36. The IEP provided that the Student would receive special education in the nature of "direct instruction in appropriate social/behavioral strategies & options" for 60 minutes daily, and that there would be "monitoring of behavioral progress" for two 15-minute periods daily. This is identical to the special

education specified by the prior IEP, except that the direct instruction periods were 30 minutes longer in the new IEP.

37. The IEP provided that the Student would receive related services of "counseling" 30 minutes per month, occupational therapy of one hour each trimester, and "autism resource" one time per week for the first six weeks and one time per month thereafter. No related services had been specified in the preceding IEP.

38. The IEP identified numerous "supplemental aids and services," including "be allowed to go to a safe/calming area to gain control/composure," "support transitions between classes," "offer sensory breaks on a scheduled and as needed basis," "offer a quiet lunch area," be given foreshadowing of transitions or changes in schedules," be provided a calculator for math, "provide alternate, distraction reduced area to take tests if needed," "be allowed to type, record or give oral answers instead of writing," and "obtain a copy of class notes of peer notes." Also identified was a "transition plan" for his transition to NHS that included 21 specific measures designed to orient the Student to NHS and its routines, and the staff to the Student. Some of these measures were redundant to other "supplemental aids and services." The supplemental aids and services specified in the new IEP were considerably expanded from the scope of the supplemental aids and services that had been specified in the preceding IEP. Many of these supplemental aids and services had been discussed during the IEP team meeting.

39. The IEP included a behavior intervention plan that was substantially identical to the behavior

intervention plan from the preceding IEP. During the IEP meeting, development of the behavior intervention plan had been deferred, with a view to waiting for the additional baseline information that SSOS was expected to generate, albeit at some unspecified future date.

40. The IEP exempted the Student from physical education. There had been no discussion during the IEP meeting respecting any physical education component of the IEP.

41. The IEP described the Student's "educational environment" to be "Separate Classroom (over 60% FTE in special education)." Below this entry, a box was checked that indicated the Student "will not participate full-time with non-disabled peers in regular education." This was the appropriate box to be check according to the stated design of the form, because the Student was to receive some special education services outside of the regular education classroom, apart from non-disabled peers. Below this checked box, the IEP explained:

> [The Student] will participate with non-disabled peers in a gradual sequence of class design. Sequence of regular education class participation will progress from small group to preferred regular education small class to gradually larger class with adult support through eventual independent functioning. His disability further requires direct instruction in social/behavioral options and approximately 15 minutes/2x daily to review progress (two check points). [The Student] will remove himself or be removed to a safe spot, in order to regain his composure, when stressors

in the regular ed room interfere with his or others learning.

Elsewhere the IEP described the Student's educational environment as follows: "[The Student] will take typical core classes in a modified small group environment, with a gradual transition to preferred regular ed class." (Ex. 516, p. 1064). Neither description indicates whether the small group classes would be in a special education resource room or in some other type of classroom.

42. The District also prepared a formal Notice of Placement with an implementation date of May 17, 2004 at Shattuck Middle School (SMS). (The Student would have been completing his 8th grade year at SMS if had been enrolled in the District schools at the time the IEP was to be implemented.)

43. The IEP and formal notice of placement were sent to the Parents on April 30, 2004. On May 4, 2004, the Parents formally rejected the placement offer.

44. By letter dated May 6, 2004, the Parents stated that the IEP did not address their concerns, and asked that the District reconsider placement of the Student at SSOS. The Parents stated that if the District was unwilling to modify the IEP to address their concerns, that the Parents would "look for a proper placement for our son, which includes placement at [SSOS], which would also include reimbursement for the costs associated with this alternative placement." The District did not formally respond to this letter. On June 18, 2004, the Parents filed a request for a due process hearing, seeking reimbursement for the "costs of placement at [SSOS], including the costs of transportation."

45. At the time of the IEP team meeting on April 22, 2004, the information reasonably gathered did not demonstrate that the Student required extended school year services to receive a free appropriate public education.

46. The 2003-2004 IEP and placement is objectively reasonably calculated to provide the Student with a free appropriate public education in the least restrictive environment.

47. The IEP had not been substantially developed by the IEP team before the IEP determined that the placement under the yet to be developed IEP would be in the District's schools. The IEP team's determination of the placement before it had substantially developed the IEP denied the Parents meaningful participation in the IEP process.

48. Before the commencement of the IEP meeting on April 22, 2004, the District had predetermined that the placement under the IEP that had not yet been substantially developed by the IEP team, would be in the District schools. The District's predetermination of the placement denied the Parents meaningful participation in the IEP process.

Appropriateness and Costs of Private School Placement

49. The Student has been enrolled as a residential student at SSOS since January 2004, including through the summer months of 2004. The annual rate for tuition is established at a per diem rate of $137.80, for a total of $33,485.40, based on 243 school days per year. The annual rate for room and board is established at a per diem rate of $192.79, for a total of $70,368.35, based on a 365-day year. In January 2004, the Parents paid $100,000 to SSOS, as advance

payment for tuition, room and board through approximately January 21, 2005. Tuition, room and board expenses have continued to be incurred for the period after January 21, 2005. The Parents have also paid $500 to the University of Chicago for a screening test for autism (ADOS) for which they seek reimbursement. For the period from May 2004 to May 2005, the Student would return home on weekends or have planned a weekend visit approximately 20 times, for which the Parents seek reimbursement for costs of travel for the approximate 400-mile round trip between their home and SSOS.

50. The Student has received appropriate education services at SSOS since his enrollment. The cost of tuition, room and board at SSOS is regulated by the State of Illinois and is within the range of reasonableness.

51. The Student does not require a residential placement to receive a free appropriate public education.

Discussion

A parent of a child with a disability who has previously received special education and related services from a public school district may unilaterally enroll the child in a private school and may be reimbursed for the expenses of the private school if (1) the school district has not made a free appropriate public education available to the child in a timely manner prior to the private school enrollment, and (2) the private placement is appropriate. Wis. Stat. § 115.791; 20 U.S.C. § 1412(a)(10)(c); 34 C.F.R. § 300.403(c).

"A free appropriate public education is one 'specially designed to meet the unique needs of the

handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.'" *Todd v. Duneland School Corporation*, 299 F.3d 899, 905 (7th Cir. 2002), quoting *Board of Education v. Rowley*, 458 U.S. 176, 188-89 (1982). A school district, however, is not required to provide the "best possible education, or the placement that the parents prefer." *Heather S. v. Wisconsin*, 125 F.3d 1045, 1057 (7th Cir. 1997).

An IEP must "contain a specific statement of the child's current performance levels, the child's short term and long-term goals, the educational and other services to be provided, and the criteria for evaluating the child's progress." *Knable ex. Rel. Knabel v. Bexley City Sch. Dist*, 238 F.3d 755, 763 (6th Cir. 2001); Wis. Stat. § 115.787(2); 20 U.S.C. § 1401(a)(20); 34 C.F.R. § 300.347(a).

For a child with a disability whose behavior impedes his learning or that of others, an IEP team must "consider, when appropriate, strategies, including positive behavioral interventions, and supports to address that behavior." Wis. Stat. § 115.787(3)(b)1; 34 C.F.R. § 300.346(a)(2)(i).

An IEP must "take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated." *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990).

The determination whether a school district has made a free appropriate public education (FAPE) available involves two basic issues: (1) whether the school district has complied with the special education law's administrative procedures; and (2) whether the school district has developed an IEP

reasonably calculated to provide some meaningful educational benefit to the child. *Rowley*.

A. ABSENCE OF SSOS REPRESENTATIVE AT IEP MEETING.

The Parents contend that the IEP team meeting of April 22, 2005 was procedurally inadequate because the District did not include in the IEP team one of the Student's current teachers.

A school district is required to insure that a representative of a private school, in which a child is then receiving educational services, attend or participate in IEP meetings only if the *school district* has placed the child in the private school. 34 C.F.R. § 300.349. There is no corresponding requirement that a school district insure the attendance or participation of a representative of a private school in which a *parent* has unilaterally placed a child with a disability. The District was not required to include a representative or teacher from SSOS in the IEP team.

The District recognized, however, that the Parents might wish to arrange for the participation of representatives of the SSOS at the IEP meeting, and offered the Parents four separate dates for the meeting in a reasonable effort to allow the Parents to arrange for their participation. The Parents reported that representatives of the SSOS would not be attending the IEP meeting, either in person or by telephone, and did not request that the meeting be rescheduled to any alternate date to permit them to participate.

The District demonstrated a keen interest in obtaining all the relevant information that it could from SSOS. There were frequent comments during the IEP

meeting that receipt of additional baseline information that SSOS was expected to provide at some later date would be very useful in the development of the IEP. The absence of SSOS personnel at the IEP team meeting and the absence of the additional expected baseline information from SSOS were not matters within the District's control. The District acted reasonably in striving to accommodate efforts by the Parents to have SSOS representatives participate in the IEP meeting, and it is not at fault for the absence of SSOS staff or teachers at the IEP meeting. The District is also not at fault for the absence of additional baseline information from SSOS at the IEP meeting, and acted reasonably in developing the IEP without it.

B. IDENTIFICATION OF THE STUDENT'S DISABILITIES AND RESULTANT NEEDS

The Parents assert that the District failed to fully identify the Student's disabilities and failed to address all the Student's educational and social emotional needs resulting from those disabilities for the 2004-2005 school year.

The District's reevaluation determined that the Student met the educational criteria of autism and other health impaired. The evaluation considered the various historical diagnoses and assessments of medical and educational professionals in determining how the Student's disabilities affected his educational performance. The diversity of opinions and conclusions respecting the identification or "label" of the Student's specific disorders is somewhat striking. (*See, e.g.*, Ex. 509, pp. 1024, 1040). Perhaps the most apt description of the Student's disabilities is that provided in August 2003 by Dr. Inglese that the Student "is a child with a complex neuropsychiatric

disturbance that compromises his ability to self regulate his attention and concentration, suppress irrelevant perseverance ideation and to defuse and divert antisocial/inappropriate impulses." The most operative term in this description is "complex." With medical professionals demonstrating difficulty in pinpointing the Student's disorders, it is hardly reasonable to expect the District to do better in determining the predominant or existing medical disorders.

It is striking also that the various diagnoses and assessments are largely consistent in identifying the behavioral manifestations of whatever disorders or disabilities the clinician or educator identified.

The evaluation team did a reasonable job of considering and synthesizing this wealth of information in its evaluation of the Student, and arriving at the conclusion that the Student met the educational criteria for autism and other health impairment. The IEP team also did a reasonable job of identifying the behaviors that were manifestations of his disabilities that needed to be addressed in the IEP.

The Parents contend that it was important for the District to identify the specific disorders under which the District arrived at the determination that the Student met the OHI criterion, in order for the District to develop an IEP that fit the needs of a child with such disorders. The District certainly could have engaged in this exercise, but I am not persuaded that it was required to do so or that if it had done so that it would have facilitated the development of a more appropriate IEP. The IEP team was well oriented to the various diagnoses and educational assessments of the Student, the Student's behaviors, and triggers for those behaviors. This included awareness and recog-

nition of historical diagnoses of OCD. There were special educators on the IEP team with training and expertise in providing educational services to children with OCD. The evidence fails to establish that the IEP team failed to take into account the Student's OCD behaviors, or any other historically diagnosed disorder, in the IEP process.

C. PARENTAL PARTICIPATION IN DEVELOPMENT OF GOALS AND OBJECTIVES, AND PLACEMENT DETERMINATION

1. General.

Parental participation in the special education of their children is a hallmark of the special education laws. In *Board of Education v. Rowley*, 456 U.S. 176, 205-06 (1982), the Court commented on the "elaborate and highly specific procedural safeguards" in the law:

> It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP . . . demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

Procedural flaws may support a finding of a denial of a free appropriate public education if they result in

the loss of educational opportunity. *Heather S. v. State of Wisconsin*, 125 F.3d 1045, 1059 (7th Cir. 1997). Procedural flaws that infringe on meaningful parental participation may be deemed to result in the loss of educational opportunity and the resulting denial of FAPE, even where the resulting IEP is determined to be substantively appropriate. *See, e.g., Pitchford ex rel. M. v. Salem-Keizer School District*, 155 F.Supp.2d 1213 (D.Or.,2001); *cf. Evanston Community Consolidated School District v. Michael M*, 356 F.3d 798, 804 (7th Cir. 2004) (concluding that parents were not denied meaningful participation); *Hoffman v. East Troy Community School*, 38 F.Supp.2d 750, 761 (E.D. Wis. 1999)(observing that procedural violations "not having to do with parental involvement in the evaluation and IEP process . . . must imperil the substantive goals" of IDEA to establish a basis for a reimbursement claim).

2. Annual Goals and Short Term Objectives.

The IEP is the centerpiece of the IDEA's education delivery system. *Honig v. Doe*, 484 U.S. 305, 311 (1988). An essential component of the IEP are measurable annual goals and supporting short term objectives that meet the child's needs that result from the disability to enable the child to be involved in and progress in the general curriculum. Wis. Stat. § 115.787(2)(b); 34 C.F.R. § 300.347(a)(2).

The IEP itself was prepared in full after the completion of the IEP team meeting on April 22, 2005. The law does not prohibit this practice, and the record establishes that it is not uncommon to do so. If the requirement were otherwise, many IEP meetings would be unduly prolonged with no resulting benefit. "It is permissible for one person to draft the IEP as long as the parents are not denied the opportunity to

participate, and the members of the IEP team have an opportunity to discuss and amend the IEP." *Hampton School Dist. v. Dobrowolski*, 976 F.2d 48, 54 (1st Cir. 1992).

At the April 22, 2004, IEP meeting, however, only one of the four goals specified in the IEP was specifically discussed, and the remaining three were not. There having been discussion of only one specific goal at the meeting, it is evident that the drafters of the IEP were left to devise their own, without the input of the other members of the IEP team, including most significantly, the Parents.

With respect to the short term objectives that supported the four annual goals, none were discussed or formulated at the IEP meeting. The short term objectives in the IEP are in very large part the same short term objectives that were contained in the preceding IEP. As with the formulation of the annual goals, it is similarly evident that drafters of the IEP were left to devise the short term objectives without assistance from the IEP team, again, most significantly the Parents.

The conclusion is inescapable that the drafters of the IEP, knowing that the placement determination was for a small group setting in the District schools, endeavored to craft goals and short term objectives that fit this placement determination.

When the District tendered the IEP and formal offer of placement to the Parents, it did not offer to reconvene the IEP team for it to discuss the appropriateness of the annual goals and short term objectives, as it should have, given that almost none were discussed during the IEP meeting. It was not incumbent on the Parents to request another IEP

meeting to consider these matters. Rather, it was the obligation of the District to recognize the procedural flaw, and offer the Parents the opportunity to participate meaningfully in the development of the annual goals and objectives, and thereafter to discuss placement under the IEP as then appropriately developed. The District's formulation of the goals and objectives wholly outside the IEP team meeting, without the Parents participating, denied the Parent meaningful participation in development of this essential component of the IEP, and constitutes a denial of a free appropriate public education.

3. Placement Determination

The discussion at the IEP meeting respecting a placement determination centered on the District's idea that it could provide the Student with instruction in core subjects in a small group environment with regular education students. The District determined this to be the appropriate placement for the Student, even though the annual goals and supporting short term objectives that largely define an IEP had not been formulated.

The District refused the Parent's frequent entreaties to consider SSOS as an appropriate placement, stating that it would be premature to do so unless the IEP team had first determined that the IEP could not be appropriately implemented in the District's schools.

School districts must enter IEP team meetings with "open minds, not a required course of action." *Deal v. Hamilton County Bd. of Ed.*, 392 F.3d 840, 858 (6th Cir. 2004), quoting *Ms. C. ex rel. N.L. v. Knox County Schools*, 315 F.3d 688, 694-95 (6th Cir.2003).

A preponderance of the evidence, though entirely circumstantial, establishes that the District entered the IEP team meeting having made up its mind to place the Student in a small group setting in the District schools under whatever IEP was formulated.

The most compelling circumstance supporting this finding is that the District determined the placement to be in the District schools before it formulated the goals and objectives that were to be included in the IEP, as discussed above. Placement must be determined "based on the child's IEP." 34 C.F.R. § 300.552; *see also* Wis. Stat. § 115.79(2). Conceptually, it is premature to make a placement determination before an IEP is completed. Here, an essential component of the IEP (annual goals and short term objectives) had not been developed at the time the District made the placement determination. Even if the District had not truly come to the IEP team meeting with a closed mind on the appropriate placement, its action in determining placement before completion of a core component of the IEP would remain a procedural violation that denied the Parents meaningful participation in the placement determination.

Another circumstance is that the District steadfastly refused to consider the Parent's request that the District consider placement at SSOS and focused wholly on placement in the District schools in a "small group setting" with regular education students, though the contours of the "small group setting" remained largely undefined, both during the IEP meeting and in the IEP itself. The LEA Representative at the IEP meeting would permit no discussion of SSOS as a placement, even though it was apparent that the Student was continuing to struggle with his behaviors at SSOS in a small group

special education setting. In view of the fact that the IEP team discussion had moved to the matter of the placement determination *before* the annual goals and short term objectives had been formulated, the Parent's request that SSOS be considered as a placement was not unreasonable, notwithstanding that SSOS is a far more restrictive educational environment than the District schools.

The District denied the Parents meaningful participation in the IEP process by predetermining that the Student would be placed in the District schools under the IEP to be developed.

Even if the District had not made such a predetermination, it denied the Parents meaningful participation by determining the placement before the annual goals and objectives were developed, and in refusing to consider the Parents' requested placement at SSOS in its premature placement discussion and determination. These procedural flaws constitute a denial of a free appropriate public education.

D. PROCEDURAL ADEQUACY OF DISTRICT'S NOTICE OF PLACEMENT

The special education laws require school districts to provide prior written notice to parents in a number of instances, including when a school district refuses to change the educational placement of a child. The content of the notice must include an explanation of why the district refused to take the action. Wis. Stat. § 115.792(2); 34 C.F.R. § 300.503.

The Parents complain that the formal offer of placement was procedurally deficient because it did not explain why the District refused to consider SSOS as an appropriate placement. The Parents are correct that the formal Notice of Placement did not

explain why the District had refused to change the Student's placement as the Parents had requested. This procedural flaw was a mere technical violation. The Parents understood from the discussion at the IEP meeting that the District did not consider SSOS as a placement for the Student because it had determined that the IEP could be implemented in the less restrictive environment of the District schools.

E. SUBSTANTIVE APPROPRIATENESS OF IEP

1. General.

In *Alex R. v. Forrestville Valley Community Unit Sch. Dist.*, 375 F.3d 603 (7th Cir. 2004), the court described the standards governing consideration of the substantive appropriateness of an IEP:

> Under the IDEA, local educators enjoy latitude in developing the IEP most appropriate for a disabled student and may apply their professional judgment. An IEP passes muster provided that it is "reasonably calculated to enable the child to receive educational benefits" or, in other words, when it is "likely to produce progress, not regression or trivial educational advancement." The requisite degree of reasonable, likely progress varies, depending on the student's abilities. Under *Rowley*, "while one might demand only minimal results in the case of the most severely handicapped children, such results would be insufficient in the case of other children." Objective factors, such as regular advancement from grade to grade, and achievement of passing grades, usually show satisfactory progress. Whether an IEP was "reasonably calculated to enable the child to receive educational benefits" is a question of fact . . . .

(Internal citations omitted).

An IEP must "take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated." *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990). Thus, the appropriateness of the IEP may not be evaluated with the benefit of hindsight, but by circumstances as they existed at the time the IEP was developed.

2. Present Levels of Educational Performance.

The Parents complain that the present levels of educational performance in the IEP are deficient, in that many do not reflect the level of the Student's performance in relation to the annual goals and objectives. For example, for the annual goal to demonstrate appropriate hand raising procedures 5 out of 10 times, there is no statement in the IEP of the frequency with which the Student presently demonstrated appropriate hand raising procedures.

The District acted reasonably in identifying the Student's present levels of performance in the behavioral areas addressed in the goals and objectives. There is no contention that the Student was not presently performing at the levels set by the goals. The absence of current data was attributable largely to the fact that the Student had not been attending the District schools for almost a year at the time of the IEP meeting. The District proceeded reasonably in visiting SSOS to observe the Student and to gain information from the staff at SSOS regarding the Student's current performance. Their observations and the information supplied by the staff at SSOS indicated that while the Student had begun to make progress behaviorally, he continued to be plagued by the same behavioral problems that existed before he was taken out of the district schools. To the extent

that the present levels of performance in the IEP led to development of goals and objectives that were inappropriately high or low, this would have become evident as the IEP was being implemented, and the goals and objectives adjusted accordingly. The absence of certain baseline data in the present levels of performance was not due to a lack of diligence on the part of the District, and would not lead to the denial of a free appropriate public education.

3. Annual Goals and Short Term Objectives.

The development of the goals and short term objectives was procedurally flawed, as discussed above. Had the development of the goals and objectives not been procedurally flawed, it is entirely possible, though not a certainty, that the IEP team would have determined that different goals and objectives would have been appropriate, but this of course is impossible to know. This notwithstanding, the information that was reasonably available to the District respecting the Student's behavioral needs at the time the IEP was developed was that he continued to be plagued by the problematic behaviors that existed at the time he was withdrawn from the District schools, with some but not major improvement. In light of this, it was not inappropriate for the IEP to contain substantially the same goals and objectives as were contained in the preceding IEP. The goals and objectives were reasonably related to meeting the Student's needs to enable him to be involved in, and progress in the general curriculum. The goals and objectives were objectively reasonable at the time the IEP was developed in April 2004.

4. Related Supports and Services; Behavioral Intervention Plan.

The behavioral intervention plan in the 2004-2005 IEP is substantially identical to the plan in the preceding IEP. This was intended by the IEP team, with a view to revisiting the plan in the future upon receipt of additional baseline information from SSOS, which the Parents had informed the District they expected SSOS to generate at some undetermined future date. The behavior intervention plan from the preceding IEP had been developed after the conduct of a functional behavioral assessment in early 2003. The staff at SSOS had provided visiting District staff with anecdotal information regarding the Student's behaviors and their antecedents, which was consistent with the information used to develop the behavior intervention plan from the preceding IEP. The behavior intervention plan, though dated, included reasonable strategies, supports and positive behavioral interventions to address the problem behaviors, and was substantively appropriate. Wis. Stat. § 115.787(3)(b); 34 C.F.R. § 300.346(a)(2)(i).

The Parents make no argument in their brief respecting any other claimed deficiencies in the "related services" and "supplementary aids and services" in the IEP, and it is not otherwise apparent from the evidence adduced at the due process hearing how these are believed to be deficient. Viewed in the context of the entire IEP, the provisions for these items in the IEP are reasonably designed to assist the Student to benefit from special education and to participate in the regular education classroom, and are substantively appropriate. Wis. Stat. §§ 115.76(15) & (16), 115.787(2)(c).

5. Physical Education.

There was no discussion during the IEP meeting regarding physical education or adaptive physical education, so there is no record why the drafters of the IEP determined to exempt the Student from physical education in the 2004-2005 IEP. This is both a procedural and substantive deficiency in the IEP, but one that could have been readily addressed and remedied in subsequent IEP meetings. The deficiency in the IEP does not in itself cause the IEP to fail to provide for meaningful educational benefit.

F. REIMBURSEMENT FOR EXPENSES OF PRIVATE SCHOOL PLACEMENT.

The prerequisites for reimbursement of the costs of the Parents unilateral private school placement have been established, the most critical being the denial of a free appropriate public education. Wis. Stat. § 115.791; 34 C.F.R. § 300.403(c). Tuition reimbursement is an equitable remedy. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993). Reimbursement may be denied or reduced if it is determined that the actions of the parents were unreasonable. Wis. Stat. § 115.791; 34 C.F.R. § 300.403(c). Consideration of the reasonableness of a parent's action may include assessing whether the cost of the private education was reasonable. *Florence County*, at 16.

The IEP that the District developed, though procedurally flawed, was substantively appropriate. If implemented as constructed in a true small group setting for instruction in core subjects with regular education students, along with daily direct instruction in social skills, the IEP is reasonably designed to provide a free appropriate public education in the least restrictive environment.

The Student's mother tellingly testified at the due process hearing that she did not believe the Student required a residential placement, and suggested that the Parents chose to enroll the Student in the residential program at SSOS because he could not be enrolled in a day program there due to its considerable distance from their home. (Tr. 1/12/05, p. 129). Regardless whether she misspoke or said what she truly believed at the time, I am not convinced that there were no suitable non-residential private schools within commuting distance of his home that could not provide appropriate educational services. While the Student undoubtedly reaps benefits from the academic and residential programs at SSOS, the evidence is insufficient to establish that a residential program is necessary to provide him an appropriate education.

I conclude therefore that the reasonable costs of the private placement at SSOS are for tuition reimbursement for the period of the ordinary school year. *See Lascari v. Bd. of Education*, 116 N.J. 30, 560 A.2d 1180 (1989). The cost of year round tuition at SSOS is $33,485.40. Since extended school year services were not shown to have been necessary for the summer period in 2004, a reasonable reduction of the tuition reimbursement is 20%. Accordingly, the Parents are entitled to tuition reimbursement of 80% of the tuition costs at SSOS, in the sum of $26,788.32.

Conclusions of Law

1. The District failed to offer a free appropriate public education under the IEP for the period May 17, 2004 to May 16, 2005.

2. The Parent's private placement of the Student at Sonia Shankman Orthogenic School was appro-

priate. The Parents are entitled to reimbursement of the reasonable expenses of their unilateral private placement of the Student for the period covered by the IEP that was proposed to be implemented on May 17, 2004. Wis. Stat. § 115.791; 20 U.S.C. § 1412(a)(10)(c); 34 C.F.R. § 300.403(c).

ORDER

The District shall reimburse the Parents $26,788.32 for the costs of the private placement at Sonia Shankman Orthogenic School for the period from May 17, 2004 to May 16, 2005.

Dated at Milwaukee, Wisconsin on May 6, 2005.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
819 N. 6th Street, Room 92
Milwaukee, Wisconsin 53203-1685
Telephone: (414) 258-6736

By: _____
William S. Coleman, Jr.
Administrative Law Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 06-3044

JOEL HJORTNESS, A Minor, By and Through His Parents and Legal Guardians ERIC HJORTNESS and GAIL HJORTNESS, ERIC HJORTNESS, and GAIL HJORTNESS,

Plaintiffs-Appellants,

v.

NEENAH JOINT SCHOOL DISTRICT,

Defendant-Appellee.

Nov. 14, 2007

Appeal from the United States District Court for the Eastern District of Wisconsin. Nos. 05 C 648, 05 C 656 William C. Griesbach, Judge.

Stephen O. Walker (argued), Saratoga Springs, UT, for Plaintiffs-Appellants.

Lori M. Lubinsky (argued), Axley Brynelson, Madison, WI, for Defendant-Appellee.

Before FRANK H. EASTERBROOK, WILLIAM J. BAUER, RICHARD A. POSNER, JOEL M. FLAUM, KENNETH F. RIPPLE, DANIEL A. MANION, MICHAEL S. KANNE, ILANA DIAMOND ROVNER, DIANE P. WOOD, TERENCE T. EVANS, ANN CLAIRE WILLIAMS, and DIANE S. SYKES, *Circuit Judges.*

ORDER

On September 4, 2007, plaintiffs-appellants filed a petition for rehearing *en banc*, and on October 1, 2007, defendant-appellee filed an answer to the petition. A majority of the judges on the panel voted to deny rehearing. A vote on whether to grant rehearing *en banc* was requested and a majority of the judges in regular active service have voted to deny the petition. Judges Ripple, Rovner, Wood, and Williams' joint opinion dissenting from the denial of rehearing *en banc* is appended.

The petition is therefore DENIED.

RIPPLE, Circuit Judge, with whom ROVNER, WOOD and WILLIAMS, Circuit Judges join, dissenting from the denial of rehearing en banc.

Joel Hjortness, a student with significant learning and behavioral disabilities, attended public school in the Neenah School District. His parents believed that the school was not addressing adequately his learning and behavioral needs, and, in May 2003, they placed him in a residential private school. In November 2003, the school district began its process of reevaluating Joel for IDEA purposes. After a number of meetings, some with and some without Joel's parents, the school district concluded that he should be placed back in the public school. His parents requested a due process hearing to seek reimbursement for the cost of private school.

The ALJ determined that the school district had complied with the substantive requirements of the IDEA by providing Joel with an individualized education plan ("IEP") reasonably calculated to provide him meaningful educational benefits. The ALJ *also found, however, that the school district had*

committed procedural violations of the IDEA by failing to develop the IEP with parental input and by making the decision to place Joel in the public school prior to the consultative process with his parents. The ALJ therefore ordered reimbursement. On appeal, the district court granted summary judgment in favor of the school district.[1] The Hjortnesses appealed.

A panel of this court affirmed, holding that predetermination was appropriate under the IDEA. Without citing any authority, the panel majority further created a mandatory presumption in favor of public school placement under the IDEA. The dissenting member of the panel concluded that the IDEA's presumption in favor of educating students with their non-disabled peers "does not permit a school district to circumvent the procedures that Congress has mandated by predetermining that a disabled student should be placed in one of its own schools." In her view, the IDEA requires placement decisions to be made based on the IEP, and allowing a school to make a placement decision before the IEP is developed would render the procedural process outlined in the IDEA meaningless.

[1] The district court appears to have disagreed with the ALJ's finding that Joel's placement had been predetermined, but its disagreement was based on its legal interpretation that predetermination is appropriate under the IDEA. *Hjortness ex rel. Hjortness v. Neenah Joint Sch. Dist.*, 2006 WL 1788883 at *6 (E.D.Wis. June 27, 2006) (referring to 20 U.S.C. § 1412(a)(5)(A), the IDEA's mainstreaming provision, and concluding that "the District had no obligation to consider placing Joel at [the private school] unless and until it concluded that he could not receive a free and appropriate public education in district schools"). The panel majority appears to have assumed the ALJ's finding that predetermination had occurred; it merely repeated the district court's conclusion that predetermination was appropriate.

While the panel majority has amended its opinion to verbalize support for *Board of Education of Township High School District No. 211 v. Ross,* 486 F.3d 267, 274 (7th Cir.2007), the text of the revised opinion notably leaves intact its approval of predetermination.[2] It takes this stance despite the fact that, only five months ago in *Ross,* this court recognized that, when school authorities determine the placement of a child in advance of the statutorily mandated consultative process with the child's parents, they violate the procedural obligations of the IDEA. The resulting IEP cannot be implemented because it is not the result of the process mandated by Congress, and therefore does not result in a free and appropriate education. In *Ross,* we noted that the IEP was the "central tool" for determining placement and that a school district could not hold "sham" IEP meetings for the purpose of merely ratifying a predetermined placement decision. *Id.* (quoting *Deal v. Hamilton County Bd. of Educ.,* 392 F.3d 840, 857 (6th Cir.2004); *Spielberg v. Henrico County Pub. Sch.,* 853 F.2d 256 (4th Cir.1988)). In the present case, by contrast, the panel majority concluded that predeter-

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[2] The panel majority opinion addressed what it recognized to be "the appellants' main challenge"-that the school district inappropriately predetermined Joel's placement. It concluded: "The ALJ found that the school district made its decision to place Joel in public school before the IEP was written. However, the IDEA requires that the school district educate Joel with his nondisabled peers to the 'greatest extent appropriate.' 20 U.S.C. § 1412(a)(5)(A). Recognizing that we owe great deference to the ALJ's factual findings, we find that the IDEA actually required that the school district assume public placement for Joel. Thus, the school district did not need to consider private placement once it determined that public placement was appropriate."

mination was permissible so long as it resulted in a substantively appropriate public placement.

The panel majority's decision is also contrary to the majority of decisions on the issue in the courts of appeal. The seminal case is the Fourth Circuit's decision in *Spielberg,* 853 F.2d 256, a case quite similar to this one. In *Spielberg,* a severely handicapped child was attending a private residential school. The public school district began an evaluation of his needs to develop an IEP, which "from the beginning" focused on placement at the public school district's special education facility. *Id.* at 257. After a series of letters and meetings with the parents, an IEP was drawn up, and the child was placed at the public school. *Id.* The Spielbergs appealed. The local hearing officer determined that the new IEP was substantively appropriate, but the district court found that the school district had violated the procedural requirements of the Education of All Handicapped Children Act (the precursor to the IDEA) by determining placement prior to developing an IEP. *Id.* at 257-58. The Fourth Circuit affirmed the district court's decision that the IEP must be developed prior to placement, holding:

> The defendants violated EHA procedures when they resolved to educate Jonathan Spielberg at [the public facility], and then developed an IEP to carry out their decision. This failure to follow EHA procedures is sufficient to hold that the defendants failed to provide Jonathan with a FAPE [free appropriate public education].

Id. at 259.

The Sixth Circuit, relying on *Spielberg,* has agreed that predetermination is inappropriate under the

IDEA, and that it can result in a denial of a free and appropriate education. *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840 (6th Cir.2004) ("Because it effectively deprived Zachary's parents of meaningful participation in the IEP process, the predetermination caused substantive harm and therefore deprived Zachary of FAPE."); *see also Nack v. Orange City Sch. Dist.*, 454 F.3d 604, 610 (6th Cir.2006). The Ninth Circuit also has found that predetermination of placement prior to formation of an IEP is impermissible under the IDEA. *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479 (9th Cir.1992). Indeed, until the panel's decision, only the First Circuit had held (cursorily) that predetermination does not necessarily result in a denial of FAPE. *See Hampton Sch. Dist. v. Dobrowolski*, 976 F.2d 48 (1st Cir.1992).

In this case, the ALJ made a finding that the Neenah School District had predetermined Joel Hjortness' public school placement before the formulation of the IEP in the consultative process. Therefore, it concluded, the placement decision was made without meaningful participation by the parents. This procedural violation denied Joel a free and appropriate public education. The panel majority opinion, contrary to the positions of the majority of other circuits, summarily concluded that this predetermination was appropriate under the IDEA.

The process sanctioned by the panel majority is also contrary to the regulations of the agency charged with the administration of the statute. The district court quoted 34 C.F.R. 300.552(c), in effect at the time of this incident, which stated that "[u]nless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that

he or she would attend if nondisabled." 2006 WL 1788983 at *6. Subpart (c), however, should not be read without its preceding subpart, which notes: "The child's placement . . . [i]s based on the child's IEP." 34 C.F.R. 300.552(b)(2). A child's placement determination must be made *after* the required consultation with the child's parents and development of an IEP.

Similarly, the mainstreaming provision of the IDEA, 20 U.S.C. § 1412(a)(5)(A), on which the panel majority relies, provides a preference for education of a disabled student with his non-disabled peers. It is debatable whether this provision also presumes public placement over private placement. Nevertheless, the provision is qualified with the phrase "to the maximum extent appropriate." Whether such placement is appropriate can only be determined after consultation with the child's parents and the development of an IEP. The school district may *presume* placement in a public school, but it may not *predetermine* placement there.

Allowing school districts to predetermine placement prior to the consultative process would have drastic consequences for the administration of the IDEA, for the governance of our educational system and for the rights of parents to have a meaningful say in the education of their child. As the dissent to the panel majority notes, school districts now have an incentive to start with a desired result and work backwards to develop an IEP with only the minimal goals that are achievable by the preselected placement. As the dissent correctly notes, the IDEA's presumption in favor of educating students with their non-disabled peers "does not permit a school district to circumvent the procedures that Congress has mandated by predetermining that a disabled student

should be placed in one of its own schools." The IDEA requires placement decisions to be made based on the IEP; allowing a school district to make a placement decision before the IEP would render the process mandated by the IDEA meaningless and leave the parents with nothing more than a charade.

The panel majority's insistence on the retention of its approval of predetermination creates, at the very least, a significant ambiguity in the law of the circuit and, it appears, a conflict with the established law of this circuit. It also appears to set the law of this circuit on a trajectory contrary to the majority of the circuits that have examined the question, and contrary to the established position of the agency charged with the administration of the statute. Members of the bench and bar, whose professional responsibilities involve the administration of the IDEA, must deal with an added and unnecessary burden because of the court's failure to clear up this situation through a rehearing by the full court. Unless this situation is corrected swiftly, the result will be a drastic disruption in the administration of the statutorily mandated consultative procedure between parents and school officials and a significant dilution of parental rights to participate in the education of their child. Accordingly, I respectfully dissent.

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No. 07-1178

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JOEL HJORTNESS, a minor, by and through his Parents and Legal Guardians, ERIC HJORTNESS and GAIL HJORTNESS, ERIC HJORTNESS, and GAIL HJORTNESS,

Petitioners,

v.

NEENAH JOINT SCHOOL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioners have presented compelling reasons to grant the Petition, where the Seventh Circuit's Opinion affirming the District Court's vigorous analysis of the evidence does not conflict with a decision of this Court or a Court of Appeals, and where the very premise underlying the Petition – that the Seventh Circuit somehow sanctioned predetermination – is not accurate.

2. Whether Petitioners have presented compelling reasons to grant the Petition, where the Respondent did not seriously infringes upon the disabled student's parents' opportunity to participate in the formulation of the student's IEP such that the student was denied a free appropriate public education in that the school district provided the parents with ample opportunities to participate in the formulation of the IEP, including before, during and after the IEP meetings, but where the parents did not avail themselves of those opportunities and instead refused to participate in the formulation of the IEP and asserted that the only issue to be discussed was whether the Respondent will pay for the cost of educating the student at his private school.

2. Whether review by this Court of the issue presented by Petitioners would have any practical effect on this case, where the evidence fails to establish that Respondent predetermined the student's placement and where it was the parents' utter refusal to participate in the process, rather than Respondent's failure to allow them to participate, that created their lack of participation in the formulation of the IEP.

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STATEMENT OF THE CASE

This case does not involve a school district's refusal to allow meaningful participation by parents in a student's Individualized Education Program ("IEP"). Rather, as both the District Court and Seventh Circuit correctly found, this case involves parents who *refused* to participate in the formulation of the student's IEP. This case involves parents whose only concern was getting the Neenah Joint School District ("Neenah") to pay for the private tuition payments of their son who they had unilaterally enrolled in private school prior to the formulation of the IEP.

The Petition is based entirely on the premise that the Seventh Circuit found predetermination, that is, that Neenah determined before the IEP meeting what placement they would offer to Joel Hjortness ("Joel"). The Seventh Circuit's decision says nothing of the sort. The only reasonable reading of the decision shows the Seventh Circuit found no predetermination, since it rejected the two – and only two – reasons the Administrative Law Judge ("ALJ") found predetermination.

Accordingly, there is no split in the Circuits that is pertinent to the resolution of this case. There is no other Circuit Court that has found predetermination in facts similar to this case, where the IEP is substantively appropriate, where the student can be educated in the public school (which is the least restrictive environment), and where the parents utterly refused to participate in the formulation of the IEP other than to demand the school pay for the parents' chosen private placement.

Further, any conflict in the Circuits is immaterial to this case, since there was no predetermination. Petitioners' assertion that Neenah did not contest the ALJ's conclusion of predetermination is patently false. *See* Pet. at 3. Neenah has always contested that conclusion, which conclusion both the District Court and Seventh Circuit did not affirm.

A procedural violation of the Individuals with Disabilities Education Act ("IDEA") alone does not constitute a violation of IDEA. The procedural flaw must cause harm to the student by causing a loss of a free appropriate public education ("FAPE"). As the courts' below concluded, since the parents refused to participate in the process other than to demand placement at their private school of choice, Neenah did nothing to interfere with their meaningful participation in the formulation of Joel's IEP. Neenah was not required to consider placement at SSOS, having concluded that Joel could be educated in the public school, which conclusion Petitioners do not challenge in their Petition.

This Court's intervention in this case will do nothing to further educational policy in this nation. The facts of this case support the lower courts' determinations that there was no predetermination in this case, and therefore there was no procedural violation of the magnitude that resulted in denying Joel FAPE.

A. FACTUAL BACKGROUND

Joel Hjortness attended public school at Shattuck Middle School in Neenah, his resident school district, until May of 2003 when his parents unilaterally withdrawn him. Pet. App. at 38a. Joel's parents, Eric and Gail Hjortness ("the parents"), enrolled Joel in a private school, first at the Kennan Academy in Menasha, Wisconsin until January of 2004, and thereafter as a residential student at the Sonia Shankman Orthogenic School ("SSOS") in Chicago, Illinois. *Id.* at 38a-39a.

In November of 2003 Neenah began the process of reevaluating Joel as required by law. *Id.* at 40a. Neenah assembled an evaluation team. *Id.* On February 26, 2004, Neenah held the first of three meetings relating to Joel's reevaluation. *Id.* at 41a. The purpose of the meeting was to review existing data and determine the need for additional testing or other evaluation materials. *Id.* The team decided to conduct additional testing to determine whether Joel continued to meet the educational criteria for other health impaired ("OHI"), autism, and emotional behavioral disabilities ("EBD"), although the parents did not agree with the EBD evaluation. *Id.* at 41a. The team also determined that it would send three team members to Chicago to the SSOS to conduct observations, meet with Joel, and obtain information from SSOS as part of the reevaluation. *Id.*

On March 12, 2004, three team members visited SSOS: the case manager who was a school psychologist, an occupational therapist and the autism resource teacher. *Id.* at 43a. By the date of their visit, Joel had

attended SSOS for about two months. *Id.* at 38a, 42a. Two of the teachers observed Joel in an environmental science class at SSOS, and confirmed with the teacher that Joel's behavior that day was fairly typical. *Id.* at 38a. The team interviewed two pairs of staff members, one from the residential portion of the facility and one from the educational portion of the facility. *Id.* at 43a. All three Neenah employees met with Joel and attempted to talk with him to gather certain information, including the completion of certain documents. *Id.* at 42a. Neenah's autism resource teacher provided Joel's teacher and a residence counselor surveys to complete relating to Asperger Syndrome. *Id.* at 42a-43a.

The second meeting was held on March 17, 2004. *Id.* at 44a. By consensus reached at that meeting, Joel was evaluated as meeting the criteria for autism and OHI. *Id.* at 45a. While the team's consensus was that Joel met the criteria for EBD, the parents voiced strong disagreement with this conclusion and as a result Neenah chose not to identify EBD as an additional disability. *Id.* at 45a.

The IEP team reconvened on April 22, 2004, for purposes of formulating Joel's IEP. *Id.* at 47a. Gail Hjortness attended, accompanied by her attorney. *Id.* Eric Hjortness did not attend the meeting. *Id.* The team included the Neenah's special education director, two regular education teachers, two special education teachers, two guidance counselors, an OHI consultant from the regional district, and the three persons who had visited SSOS. *Id.*

Neenah's special education director served as the LEA representative and led the discussion at the meeting. *Id.* Gail Hjortness made an audio recording of the meeting, which recording is approximately two hours and twelve minutes long, but does not capture the final 10 to 15 minutes of the meeting. *Id.* Thus, the meeting was almost 2 ½ hours long. *Id.*

The goals and objectives were discussed in general terms during the meeting. *Id.* at 48a; *Id.* at 18a ("After discussing Joel's strength's and weaknesses, the parties proceeded to discuss, in general terms, goals and short-term objectives for Joel's education.") However, according to the ALJ, the "specifics" of some of the goals and objectives were not discussed at the IEP meeting, although the discussion provided information from which to develop appropriate goals and short term objectives. *Id.* at 48a. The reason for this was explained well by the District Court:

> On several occasions in the course of the two-and-a-half hour meeting, members of the team attempted to focus on the task of setting specific goals and objectives. Joel's mother, along with her attorney, was part of that process and was specifically asked for her input. Rather than suggest goals and short-term objective she wanted included in the IEP, Joel's mother made clear to the team that she did not believe the District could provide her son an appropriate education. In her view, "the issue on the table [was whether the District would] pay for him to be at Sonia Shankman where he needs to be . . . ."

> (Exh. C, Disk #2, Track 5.) Despite her view that the District was unable to meet her son's needs, the team continued to discuss the efforts it was willing to undertake in order to provide Joel an appropriate education. They offered to revisit the IEP once the anticipated evaluation from SSOS was received or if problems surfaced in the course of the year. They also offered to meet with the Parents to discuss any changes they thought appropriate. Moreover, upon receipt of the completed IEP, Joel's mother did not complain that the goals and short-term objectives had not been adequately discussed or request additional ones be added. Her cryptic letter simply stated that "the IEP you proposed does not address the concerns we have repeatedly raised." (Ex. 577) She asked the District to reconsider placement at SSOS and stated that if the District was unwilling to modify the IEP and address "the concerns we have previously raised," she would look elsewhere, including SSOS for placement of her son.

Id. at 29a.

The IEP team determined that Joel needed instruction in a small group setting. *Id.* at 48a. The LEA representative said that Joel could receive instruction from special education teachers teaching the core subjects in a small group setting with regular education students. *Id.* at 48a-49a. The IEP team discussed whether Neenah had the financial resources to construct the small group classes with regular education

students at the Neenah High School, and IEP team agreed that Neenah could provide such a placement for Joel. *Id.* at 49a. Mrs. Hjortness asked the team to consider placing Joel at SSOS, and went so far as to define the ultimate issue for the IEP team to be whether Neenah would pay for Joel to attend SSOS under the IEP being developed. *Id.* at 50a. The IEP team did not formally consider the SSOS placement because the team felt that the specially designed program that they discussed and agreed-upon would meet his needs, and because such placement was in a less restrictive environment than SSOS and therefore by law was the required placement. *Id.*

The parents formally rejected Neenah's placement offer on May 4, 2004. *Id.* Despite already having rejected the placement offer on May 4, 2004, the parents sent the LEA representative a letter dated May 6, 2004, stating in relevant part:

> The IEP you proposed does not address the concerns that we have repeatedly raised. Before asking us to approve or disapprove of this placement, we would like you to reconsider placement at [SSOS]. We don't think you fairly considered this placement at the last IEP meeting on April 22, 2004.

Id.

B. PROCEDURAL BACKGROUND

On June 18, 2004, the parents filed a due process hearing request against Neenah seeking reimbursement for the cost of Joel's placement at SSOS, including the cost of transportation. The parents alleged that Neenah deprived Joel of FAPE relating to Joel's IEP dated April 22, 2004.

After a five day hearing, the ALJ issued a decision dated May 6, 2005. The ALJ found that Neenah complied with the IDEA by providing Joel with an IEP that was reasonably calculated to provide him with meaningful educational benefit. ALJ Coleman concluded, however, that Neenah committed a procedural violation of the IDEA. As a result of the alleged procedural violation, the ALJ ordered Neenah to reimburse the parents $26,788.32 for the cost of the parents' unilateral private school placement of Joel.

Neenah filed an appeal to the United Stated District Court for the Eastern District of Wisconsin of the ALJ's decision finding a procedural violation of the IDEA. The parents filed an appeal to the United Stated District Court for the Eastern District of Wisconsin of the ALJ's decision finding that Neenah complied with the IDEA by providing Joel with an IEP that provided him with a FAPE. The two appeals were consolidated. Neenah filed a Motion for Summary Judgment. The parents filed a Motion for Judgment on the Record. No additional evidence was presented to the District Court.

By Decision and Order dated June 27, 2006, the Honorable William C. Griesbach, United States District

Judge for the Eastern District of Wisconsin, granted Neenah's Motion for Summary Judgment and reversed that portion of the ALJ's decision finding that Neenah committed a procedural violation of the IDEA. Judge Griesbach denied the parents' Motion for Judgment on the Record, and as a result denied their request for reimbursement of the costs of the private school tuition and related expenses.

On appeal, the Seventh Circuit affirmed. The parents filed a petition for rehearing en banc, which petition was denied.

Petitioners filed a Petition for Writ of Certiorari.[1] In their Petition, Petitioners do not challenge the lower courts' decisions that the IEP developed for Joel was substantively appropriate and, if it had been implemented, would have provided Joel with FAPE. In the lower courts, the parents raised numerous procedural challenges, all of which the lower courts rejected. In their Petition, the Petitioners only challenge one claimed procedural violation relating to their claim that Neenah predetermined placement of Joel in the public school before the IEP meeting.

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[1] While two amicus parties filed Motions for leave to file an amicus brief in support of the Petition, neither motion raised any relevant issues or law that were not addressed in the Petition. The amicus Motions do not bring to the Court's attention relevant matter not already raised by the Petitioners, as required by Supreme Court Rule 37.

REASONS FOR DENYING THE PETITION

Petitioners inflate this case into one presenting "a fundamentally important question of federal education law . . ." presenting a "conflict[] with the clear holdings of other circuits." Pet. at 2, 3. On the contrary, the Seventh Circuit concluded that in this particular case the parents were not meaningfully denied an opportunity to participate in the formulation of the IEP such that Joel was denied a FAPE. Contrary to Petitioners' suggestion, the Seventh Circuit did not decide that Neenah predetermined Joel's placement. In fact, there is no credible evidence in the record to establish that Neenah predetermined Joel's placement, which is a decision that the District Court and Seventh Circuit reviewed de novo of the ALJ's decision. Thus, the Seventh Circuit's decision does not conflict with any other Circuits' decisions.

Even assuming the existence of a conflict between the Seventh Circuit's decision and decision of any other Circuit, such conflict is simply not relevant to this case because Neenah did not predetermined Joel's placement at the public school.

Finally, granting the Petition would have no impact on the outcome of this case, since Neenah did not predetermine placement and the parents' utter refusal to participate in the process, rather than Respondent's failure to allow them to participate, that created their lack of participation in the formulation of the IEP.

I. Review Of The Seventh Circuit's Decision Is Not Warranted Because The Petition Relies On A False Premise – Namely That The Seventh Circuit Somehow Sanctioned Predetermination

Contrary to Petitioner's argument, the Seventh Circuit did not conclude that it is appropriate to predetermine a student's placement. Even the dissent to the petition for rehearing en banc recognized that the panel majority may not have gone as far as Petitioners suggest: "The panel majority *appears* to have *assumed* the ALJ's finding that predetermination had occurred . . . ." Pet. at 78a, n.1 (emphasis added).

Contrary to the dissent's characterization of the panel's decision, the Seventh Circuit never explicitly or implicitly decided that Neenah predetermined placement. In fact, the exact opposite is true. This conclusion is inescapable after reviewing the ALJ's rationale for his conclusion of predetermination, and the lower courts' rejection of that rationale.

The ALJ concluded that Neenah predetermined placement because it did not consider the parents' demand that Joel be educated in private school once it determined that Joel could be educated in a far less restrictive environment – a regular education classroom in the public school.

Consistent with decisions from other courts, both the District County and the Seventh Circuit held that Neenah was not required to consider the private

placement having determined that a public placement was appropriate. As the Seventh Circuit explained:

> Finally, we turn to the appellants' main challenge - that the school district denied Joel a free appropriate public education because it predetermined Joel's placement. The ALJ found that the school district made its decision to place Joel in public school before the IEP was written. However, the IDEA requires that the school district educate Joel with his nondisabled peers to the "greatest extent appropriate." 20 U.S.C. § 1412(a)(5)(A). Recognizing that we owe great deference to the ALJ's factual findings, we find that the IDEA actually required that the school district assume public placement for Joel. Thus, the school district did not need to consider private placement once it determined that public placement was appropriate.

Pet. App. at 10a. This is the entire portion of the Seventh Circuit's opinion relating to Petitioners' claim of predetermination. The Seventh Circuit did not sanction predetermination; it rejected the ALJ's reasoning supporting his conclusion of predetermination.

The Seventh Circuit's reasoning was analogous to the District Court's analysis of the predetermination issue:

> The question, however, is whether such inadequacies are present in this case. ALJ

Coleman found that they were in two respects – first, the District's arguably premature determination of Joel's placement, and second, the District's failure to reconvene the IEP team after it formulated the goals and objectives outside the presence of the Parents. With respect to the former supposed inadequacy, the court cannot reconcile ALJ Coleman's ruling with his other findings and with the requirements of the IDEA. The IDEA required the District to mainstream Joel to the maximum extent appropriate:

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A). Pursuant to this provision, the District "must ensure that '[Joel] is educated in the school that he . . . would attend if nondisabled' unless [Joel's] educational program 'requires some other

arrangement.'" *Casey K. ex rel. Norman K. v. St. Anne Community High School Dist. No. 302*, 400 F.3d 508, 512 (7th Cir. 2005) (quoting 34 C.F.R. § 300.552). In other words, the District had no obligation to consider placing Joel at SSOS unless and until it concluded that he could not receive a free and appropriate public education in district schools. *See* 20 U.S.C. § 1412(a)(10)(C)(i) ("[T]his subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility."); *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C. Cir. 1991) ("[I]f there is an appropriate public school program available, i.e., one reasonably calculated to enable the child to receive educational benefits, the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child. . . . In short, the inquiry as to the appropriateness of the State's program is not comparative.") (internal quotation marks and citations omitted). The District determined, and the ALJ found, that Joel could receive a free and appropriate public education in district schools. (Decision at 22.) Having so concluded, the District was entitled to draft an IEP that assumed Joel would be educated in the

> District's schools, and was not required to consider placement at SSOS. *Hampton Sch. Dist. v. Dobrowolski*, 976 F.2d 48, 54 (1st Cir. 1992) (holding that determining placement before drafting of IEP did not violate IDEA).

Pet. App. at 26a-28a.

Thus, both the District Court and the Seventh Circuit rejected the reasoning underlying the ALJ's conclusion of predetermination. The Seventh Circuit did not determine that predetermination occurred. It did not determine that despite predetermination, there was no procedural violation. It rejected the rationale for the ALJ's conclusion of predetermination. Therefore, the Seventh Circuit implicitly found no predetermination.

Moreover, the Seventh Circuit found that while it may have been the case that the goals and objectives "never got beyond 'general terms'," Pet. at 28a, the Seventh Circuit found that there was no credible evidence to conclude that discussing the concepts in general terms deprived the parents of a meaningful opportunity to participate in the process of formulating the IEP such that Joel was denied a FAPE. Pet. at 29a. Similarly, the District Court found that the evidence established it was not Neenah that deprived the parents of the ability to participate; rather it was the parents who refused to participate in any discussion other than their desire for Joel to be placed at SSOS. Pet. App. at 31a.

In short, the Seventh Circuit rejected the only reasons offered by the ALJ for his conclusion that

Neenah predetermined placement. Having rejected the rationale, the only reasonable conclusion to draw is that the Seventh Circuit rejected the predetermination decision. Certainly, the decision cannot be cited for the exact opposite proposition – that predetermination is acceptable.

Petitioners rely on the dissent's suggestion that the majority "appears" to have "assumed" predetermination. This was the dissent's characterization of the majority's opinion. Nowhere in the majority's decision does the Seventh Circuit state that Neenah predetermined placement and despite such predetermination, Neenah did not violate the IDEA. This Court should not accept review of an "assumed" holding that is contrary to the reasonable reading of the Seventh Circuit's decision.

This case simply does not provide the vehicle of the Court to review whether predetermination always amounts to a procedural violation. The Seventh Circuit did not find predetermination, and instead found that the parents were not denied a meaningful opportunity to participate in the formulation of Joel's IEP. The Seventh Circuit's decision does not merit review by this Court.

II. Review By This Court Of The Seventh Circuit's Decision Is Not Warranted Because Neenah Did Not Predetermine Joel's Placement At The Public School.

Predetermination amounts "to a procedural violation of the IDEA." *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 857 (6th Cir. 2004). It can cause substantive harm, and therefore deprive a child of FAPE, where parents are "effectively deprived" of "meaningful participation in the IEP process." *Id.*

Predetermination is not synonymous with preparation. *Nack ex rel. Nack v. Orange City Sch. Dist.*, 454 F.3d 604, 610 (6th Cir. 2006). Federal law "prohibits a completed IEP from being presented at the IEP Team meeting or being otherwise forced on the parents, but states that school evaluators may prepare reports and come with pre-formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions." *Id.*, citing *Ms. C. ex rel. N.L. v. Knox County Sch.*, 315 F.3d 688, 694 (6th Cir. 2003); 34 C.F.R. 300, App. A, No. 32. In *Knox County Schools*, the court emphasized that school officials are permitted to form opinions and compile reports prior to IEP meetings. *Knox County Sch.*, 315 F.3d at 693-94 n.3. The court found that forming opinions before the IEP meeting is harmless as long as school officials are "willing to listen to the parents." *Id.* at 694-95.

The decision as to whether a school district engaged in predetermination is a question that the court reviews

de novo, since it is a mixed question of law and fact. *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 766 (6th Cir. 2001).

In *Spielberg ex rel. Spielberg v. Henrico County Public Schools*, 853 F.2d 256 (4th Cir. 1988), the school district decided to change the student's placement before drafting the IEP. The Fourth Circuit found that a procedural violation occurred because the placement had been predetermined. In *Deal*, 392 F.3d at 858, the Sixth Circuit found predetermination where (1) the school district committed numerous procedural and substantive errors, (2) the school district had an unofficial policy of refusing to consider certain programs regardless of the child's needs, and (3) that the district's main concern was financial. *See Winkelman v. Parema City Sch. Dist.*, 411 F. Supp. 2d 722, 728-29 (N.D. Ohio 2005). Indeed, in *Deal*, the parents were not even allowed to ask questions during the IEP meetings. *Id.*

In far more cases, however, courts have declined to find predetermination. For example, in *Knox County Sch.*, 315 F.3d at 694-95, the court found no predetermination where the parent was not involved in the initial, ex parte determination of eligibility but was an active participant in the final determination. In *Fuhrmann ex rel. Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1036 (3d Cir. 1993), the court found that the parents had an opportunity to participate in formulating the IEP in a meaningful way. In *Hanson ex rel. Hanson v. Smith*, 212 F. Supp. 2d 474, 486 (D. Md. 2002), the court found credible evidence that school board came to the IEP meetings with an open mind, and that several options were discussed and considered

before a final recommendation was made. In *Doyle v. Arlington County Sch. Bd.*, 806 F. Supp. 1253, 1262 (E.D. Va. 1992), *aff'd*, 39 F.3d 1176 (4th Cir. 1994), the court held that the school had merely proposed a placement before the IEP meeting was completed and had not "fully made up its mind before the parents ever [got] involved," thereby denying the parents "the opportunity for meaningful input." In *Schoenback v. District of Columbia*, 2006 WL 1663426, *5 (D.D.C. 2006), the court found no predetermination where the teacher's research of potential placements before the IEP meeting demonstrated only that the teacher was doing her job, not that the district predetermined the student's placement.

In *Nack*, 454 F.3d 604, the Sixth Circuit found insufficient evidence to find predetermination where the parent was given many opportunities to comment on the IEP and the school district took her comments seriously. Like in this case, in *Nack*, there were three separate IEP meetings, the parent actively participated in each of these meetings and the parent repeatedly made school officials aware of her disapproval of the student's program and her desire for the student to remain in the regular education setting.

In this case, the ALJ concluded that a preponderance of the evidence, "though entirely circumstantial," suggested that Neenah entered the IEP meeting having made up its mind as to Joel's placement under whatever IEP was developed at the meeting. Pet. App. at 66a. The ALJ offered two reasons for his conclusion of predetermination. *Id.* First, he determined that because the goals and objectives were

not formulated at the meeting, the IEP team's consideration of placement was premature. *Id.* Second, he relied on the fact that Neenah did not give serious consideration to the parents' requested placement at SSOS. *Id.* at 66a-67a. As both the District Court and Seventh Circuit found, the ALJ's reasoning is in error, and therefore his conclusion is as well.

As to the first reason offered by the ALJ, as the District Court and Seventh Circuit correctly found, the IEP team *did* discuss goals and objectives at the IEP team meeting, and therefore it was not in error to discuss placement at the meeting. As the District Court found, "[a]fter discussing Joel's strength's and weaknesses, the parties proceeded to discuss, in general terms, goals and short-term objectives for Joel's education." Pet. App. 18a. While Neenah did not write out the IEP at the meeting, the law does not require that it do so. *See Hampton Sch. Dist. v. Dobrowolski*, 976 F.2d 48, 54 (1st Cir. 1992).

Further, as both the lower courts found, not only did Mrs. Hjortness and her attorney not object to the alleged lack of sufficiently detailed discussion about goals and objectives either during or even after the meeting, it was abundantly clear from her own tape recording that Mrs. Hjortness had absolutely no interest in discussing specific goals or objectives. The record is clear that Mrs. Hjortness did not want to talk about goals and objections. She had only one goal on her mind: placement at SSOS.

As the District Court correctly found, it is one thing to say that Neenah should have reconvened the IEP

meeting to further discuss goals and objectives; it is quite another to conclude that the parents were denied the opportunity to meaningfully participate in the formulation of the IEP. The IEP team tried to focus on goals and objectives, and unfortunately that was not Mrs. Hjortness's focus. Mrs. Hjortness expressed her view that under no circumstances could Neenah provide Joel with a FAPE in the public school setting. Despite her view, the IEP team continued to discuss Joel's needs. Neenah offered to reconvene the IEP team at least four times, and offered to review the data from SSOS when it became available at least six times during the meeting. When the parents objected to the placement offer, not once did they mention anything about being denied a right to participate in the formulation of Joel's IEP, including the goals and objectives. Their letter is telling: the only thing they complained about is the placement.

The second and final rationale offered by the ALJ to support his conclusion of predetermination was that Neenah refused to consider the parents' requested placement at SSOS having concluded that Neenah could provide Joel with FAPE not only in the public school, but in a specially designed class with regular education students. As both of the lower courts correctly found, the presumption of least restrictive environment as required by the IDEA means that if a public school placement is appropriate, a school district *need not consider a private placement*, even one preferred by the parents. *Schoenbach v. District of Columbia*, 309 F. Supp. 2d 71, 80 (D.D.C. 2004); *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C. Cir. 1991); *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*,

931 F. Supp. 474, 479 (S.D. Tex. 1996); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992-93 (1st Cir. 1990).

This makes perfect sense. School districts are charged under IDEA with formulating an IEP that provides FAPE to a student in the least restrictive environment. *See Oberti v. Board of Educ. of the Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1214 (3d Cir. 1993). If a school district can provide FAPE within the public school setting, then by definition such a placement is less restrictive than a residential setting. The parents focus on SSOS for Joel's placement ran directly contrary to the IDEA's presumption of least restrictive environment. Neenah appropriately chose to focus on developing an IEP that would provide Joel with FAPE in the least restrictive environment. While Mrs. Hjortness wanted the IEP meeting to focus on whether Neenah would pay for Joel's placement at SSOS, Neenah was charged by law with providing Joel with FAPE in the least restrictive environment. Once the team determined that could be done in the public school, consideration of a private placement was pointless.

Accordingly, the fact that Neenah did not formally consider Joel's placement at SSOS is <u>not</u> evidence Neenah made up its mind about placement before the meeting. The law simply did not require Neenah to consider SSOS once the IEP team determined that Joel could be educated at Neenah in a far less restrictive environment than a residential placement.

Both the District Court and the Seventh Circuit correctly found the two reasons offered by the ALJ for

his conclusion of predetermination were not valid. Both of the lower courts correctly determined that the parents' procedural rights were not violated because there was no procedural violation and because there was absolutely no harm to the parents in light of their one and only goal in the entire IEP process. The lower courts' decisions are correct, are not contrary to any other Circuit's decision, and present no fundamentally important issue warranting review by this Court.

III. Even If A Circuit Conflict Exists, This Case Presents A Poor Vehicle For Resolving It.

Even where a clear conflict exists among Circuits, certiorari may be denied where resolution of the conflict would be irrelevant to the outcome of the case. Gressman, Geller et. al., SUPREME COURT PRACTICE, 248 (9th ed. 2007), *citing Sommerville v. United States*, 376 U.S. 909 (1964).

Lower courts have made predetermination decisions in a variety of factual circumstances. By assuming the Seventh Circuit found predetermination, the Petitioners elevate the Seventh Circuit's decision as creating a split among the Circuits. Even if the Seventh Circuit decision created a split among the Circuits (which it does not), this case does not provide the Court with a vehicle with which to address it.

First, as the evidence outlined above makes clear, no predetermination was made in this case. Therefore, even if the Court accepted the Petition, the outcome would be no different to the Petitioners.

Second, the record is clear that it was the parents' utter refusal to participate in the process (other than demanding the placement they wanted), rather than Neenah's failure to allow them to participate, that created their lack of participation in the formulation of the IEP. As the Seventh Circuit explained:

> Considerable time was spent in multiple IEP conferences at which Joel's parents and their advocate participated. At several times during these conferences, the team attempted to set specific goals and objectives, but the Hjortnesses insisted that "the issue on the table [was whether the school district would] pay for [Joel] to be at Sonia Shankman where he needs to be." The school district arguably should have held a second IEP meeting to review the goals and objectives that were not discussed at the meeting. However, this procedural violation does not rise to the level of a denial of a free appropriate public education. The record does not support a finding that Joel's parents' rights were in any meaningful way infringed.
>
> We note that this determination in no way contravenes our decision in *Ross*. In *Ross*, the parents of a girl with Rett syndrome [footnote omitted] alleged, inter alia, that they were denied a meaningful opportunity to participate in the modification of their daughter's IEP, which constituted a procedural violation of the IDEA. 486 F.3d at 274. The *Ross* Court affirmed the district

court's holding that the parents did in fact have a meaningful opportunity to participate in the comprehensive review of their daughter's situation and IEP, referencing a 32-page conference summary report of the seminal meeting at which they participated. *Id.* at 275. The consensus reached at the end of that meeting was to change the girl's placement; a decision that the girl's parents opposed. *Id.* However, the Court held that just because the placement was contrary to the parents' wishes, it does not follow that the parents did not have an active and meaningful role in the modification of their daughter's IEP, as required by the IDEA. *See id.* at 274-75.

In this case, it is not that Joel's parents were denied the opportunity to actively and meaningfully participate in the development of Joel's IEP; it was that they chose not to avail themselves of it. Instead of actively and meaningfully participating in the discussions at multiple IEP meetings, the Hjortnesses refused to talk about anything other than "[whether the school district would] pay for [Joel] to be at Sonia Shankman where he needs to be." As a result, the school district was left with no choice but to devise a plan without the meaningful input of Joel's parents. Under these circumstances, the parents' intransigence to block an IEP that yields a result contrary to the one they seek does not amount to a violation of the

> procedural requirements of the IDEA. To hold otherwise would allow parents to hold school districts hostage during the IEP meetings until the IEP yields the placement determination they desire.
>
> . . .

Pet. App. at 7a-9a. (Emphasis added.)

The Seventh Circuit decision exemplifies why this is not a good case to resolve any alleged split in the Circuits. When parents refuse to participate in the formulation of an IEP, a school district is still bound to develop an IEP and placement offer. In this case, Neenah had no choice but to proceed. There is only one conclusion that can be drawn from the record in this case: the parents did not want to participate in the process. They wanted one and only one thing: placement of Joel at SSOS. For the parents to now complain about lack of participation in the formulation of goals and objectives when they refused to participate in the process of formulating the goals and objections renders this case a very poor vehicle for resolving any alleged Circuit conflict.

CONCLUSION

Petitioners have not established any compelling reason for this Court to grant the Petition. For the foregoing reasons, Respondent respectfully requests the Petition be denied.

Respectfully submitted,

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No. 07-1178

IN THE

Supreme Court of the United States

JOEL HJORTNESS, A MINOR, BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS ERIC HJORTNESS AND GAIL HJORTNESS, ERIC HJORTNESS, AND GAIL HJORTNESS,

Petitioners,

v.

NEENAH JOINT SCHOOL DISTRICT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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INTRODUCTION

Petitioners demonstrated that the decision below conflicts with that of other circuits on a fundamentally important question of federal education law: whether a school district can circumvent the procedural safeguards of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, by predetermining a child's placement in a public school before the meeting with the parents where the parents and district members are required to develop an individualized education program ("IEP") for the child. Respondent's opposition fails to show otherwise.

Contrary to respondent's claim, the holding of the decision below conflicts with that of other circuits. Respondent attempts to divert attention from the legal issues presented here by focusing on the parents' purported conduct, but the court of appeals' assertions in that regard are both irrelevant for purposes of certiorari and simply wrong. Finally, respondent fails to refute petitioners' showing that this case raises a fundamentally important question of federal education law because the court of appeals created an exception to the rule against predetermination in cases where the school district proposes public placement.

1. Petitioners demonstrated (Pet. at 15-21) that the decision below conflicts with other circuits' holdings that a school district commits a procedural violation of the IDEA by predetermining a child's placement before the IEP meeting with the parents and before the formulation of the child's IEP. See *Spielberg ex rel. Spielberg* v. *Henrico County Pub. Sch.*, 853 F.2d 256, 259 (4th Cir. 1988); *Deal* v. *Hamilton County Bd. of Educ.*, 392 F.3d 840, 857-59

(6th Cir. 2004); *W.G.* v. *Bd. of Trs.*, 960 F.2d 1479, 1484 (9th Cir. 1992). The court of appeals below held that a school district did not violate the IDEA when there were clear findings of fact that it unilaterally made a public school placement determination prior to the IEP meeting with the parents and prior to the formulation of the child's IEP. Respondent's attempts to deny this fundamental conflict are unavailing.

Respondent contends that the ruling below does not conflict with the holdings of other circuits that predetermination is a procedural violation of the IDEA because the court of appeals below merely concluded that no predetermination occurred here. See, *e.g.*, Opp. at 1, 10-12, 15-16, 23. Respondent, however, does not and cannot dispute that the court of appeals did not reject or find clearly erroneous the ALJ's unequivocal findings that predetermination occurred in this case. See, *e.g.*, Pet. App. 51a (the District "entered the IEP meeting having predetermined that the placement of the Student under the IEP to be developed at the meeting would be in the District schools"); *id.* at 56a ("Before the commencement of the IEP meeting on April 22, 2004, the District had predetermined that the placement under the IEP that had not yet been substantially developed by the IEP team, would be in the District schools."); *id.* at 66a ("the District steadfastly refused to consider the Parent's request that the District consider placement at SSOS"). In the face of these undisturbed findings, the court of appeals' holding that the IDEA was not violated here conflicts with the clear holdings of the other circuits and warrants this Court's review.

In this regard, contrary to respondent's suggestion, Opp. at 16, the four judges who dissented from the

denial of rehearing en banc plainly understood the panel majority's decision as "holding that predetermination was appropriate under the IDEA" and, therefore, creating a conflict with "the majority of decisions on the issue in the courts of appeal." Pet. App. 78a, 80a; see also *id.* at 79a-80a ("the panel majority concluded that predetermination was permissible so long as it resulted in a substantively appropriate public placement"). Their understanding belies respondent's contrary characterization. At the very least, it will lead lower courts in the Seventh Circuit to construe the law of that circuit as an "approval of predetermination" and decide cases accordingly, at least when the school district predetermines a public school placement. *Id.* at 83a.

Respondent also makes much of the panel majority's assertions about the parents' alleged non-cooperation in the IEP proceedings. Opp. at 1, 10, 20-21, 24-26. But the panel majority's assertions are both irrelevant for purposes of certiorari and simply wrong. First, the panel's gratuitous and unsupported assertions are completely irrelevant to the legal issue presented here. No matter how parents approach the IEP process and the IEP meeting in particular, the school district is not permitted to predetermine the child's placement prior to that meeting. That is, parental conduct at an IEP meeting plainly cannot justify a placement determination improperly made *prior* to that meeting. See Pet. App. 12a (Judge Rovner noting in dissent that the parents' alleged conduct with respect to the IEP meeting "made no difference" because respondent, "as the ALJ found, had already decided where to place" Joel). Parental behavior also is a particularly odd target for criticism where, as here, the parents' claim is that the IEP meeting was a one-sided and meaningless formality.

Even if the parents' involvement were germane to a school district's duty not to predetermine placement, it is clear that the Hjortnesses actively participated in the IEP process. The ALJ, the fact-finder in this case, made no findings that even remotely suggest that the Hjortnesses did not fully cooperate in all aspects of the IEP proceedings. To the contrary, the ALJ's findings belie any notion that the parents "did not want to participate in the process," "did not want to talk about goals and objecti[ves]," or only had the "one goal" of obtaining "placement at SSOS." See Opp. at 20, 26. The ALJ's findings show that the Hjortnesses were diligent and active participants in the meetings with the District. With respect to the IEP meeting in particular, neither the ALJ's findings nor the tape recording of the meeting suggest that Mrs. Hjortness did not participate in all parts of the discussion, including the discussion in general terms of annual goals and short-term objectives. Indeed, the ALJ's findings and the recording specifically reveal that Mrs. Hjortness addressed and provided input on several key topics discussed at the meeting aside from placement, such as the need for Joel's instruction in small group settings (Pet. App. 48a), the appropriate class size for Joel (*id.* at 49a), the need for direct instruction in social skills (*id.* at 50a), and Joel's need for extended school year services (*id.*).

The panel majority's assertions to the contrary are wholly untethered to the factual findings made by the ALJ, and the district court did not take any additional evidence that could provide a factual basis for these statements. Accordingly, the panel majority's assertions are not factual findings. The Court should disregard them because they contravene the well-established principle in IDEA cases that courts must grant substantial deference to the findings of

the trier of fact. See *Bd. of Educ.* v. *Rowley,* 458 U.S. 176, 206 (1982) (under the IDEA, reviewing courts are required to accord "due weight" to the determinations made during the state administrative process); see also *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S 100, 123 (1969) ("The authority of an appellate court . . . is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence.").

Finally, there is no merit to respondent's suggestion that this case does not warrant review because the ALJ and the courts below concluded that Joel's IEP was substantively appropriate. Opp. at 9 (noting that petitioners do not seek review of these findings). This Court has made clear that the IDEA imposes procedural obligations on school districts that are separate from their substantive obligations. *Rowley,* 458 U.S. at 206-07 (describing the "twofold" nature of the courts' inquiry into the school district's conduct in IDEA cases). Because these obligations are independent, even when a school district satisfies its substantive obligations under the IDEA, its failure to follow proper procedures can deprive the child of a free appropriate public education. See 20 U.S.C. § 1415(f)(3)(E)(ii) (describing circumstances in which procedural violations can support findings of denial of a free appropriate public education, including where the procedural violation "significantly impeded the parents' opportunity to participate in the decision-making process"); Pet. App. 7a ("procedural inadequacies that result in the loss of educational opportunity result in the denial of a free appropriate public education"). Accordingly, the finding that no substantive violation occurred does not detract from

the certworthiness of the important procedural issues presented by this case.

2. Petitioners further demonstrated, Pet. at 21-23, that the decision below poses an "important question" of federal education law because in addressing the predetermination issue, the court of appeals essentially created an unauthorized statutory exception to the rule against predetermination in cases where the school district proposes public placement. Specifically, the court of appeals improperly suggested that the District's refusal at the IEP meeting to consider the parents' proposed private placement was a permissible application of the Act's presumption in favor of the least restrictive environment. Pet. App. 10a. Petitioners demonstrated that this reasoning is erroneous because pursuant to the IDEA's procedural requirements, the determination whether a proposed public placement will in fact provide the child with a free appropriate education must involve the parents and must be based on a fully developed and properly formulated IEP. Pet. at 20.

Respondent does not refute this argument. Instead, respondent simply repeats the reasoning of the court of appeals and asserts that it "makes perfect sense." Opp. at 22 Respondent, however, does not confront petitioners' analysis demonstrating that the court of appeals effectively sanctioned a backward process that is inconsistent with the IDEA's clear requirements.

Respondent does not dispute that it "determined" at the IEP meeting that Joel's placement would be in the public schools without considering the parents' views that this placement would not provide him with an appropriate education. *Id.* at 2 ("Neenah was not required to *consider* placement at SSOS, having

concluded that Joel could be educated in the public school") (emphases added); *id.* at 22 (acknowledging that the District "did not formally consider Joel's placement at SSOS" and asserting that "[t]he law simply did not require Neenah to *consider* SSOS once the IEP team *determined* that Joel could be educated at Neenah") (emphases added). But as petitioners demonstrated, Pet. at 20-21, the District's unilateral determination that public school placement would provide Joel with an appropriate education, without *considering* the parents' views to the contrary, was a fundamental violation of the IDEA. The statutory scheme requires the District to take into account the concerns of the parents on that issue and on whether private alternatives should be considered.

The IDEA likewise requires that placement determinations be based on a fully developed and properly formulated IEP. See Pet. at 20 (citing 20 U.S.C. § 1401(9) and 34 C.F.R. § 300.116(b)(2)). Respondent does not attempt to, and cannot, claim that this requirement was followed here: it is indisputable that Joel's IEP did not exist until *after* the meeting at which the District unilaterally determined his placement. Accordingly, the lower courts were simply wrong in holding that "[h]aving . . . concluded [that Joel could receive an appropriate education in District schools], the District was entitled to draft an IEP that assumed Joel would be educated in the District's schools," and respondent is wrong in endorsing this erroneous reasoning and asserting that it does not warrant this Court's review. See Pet. App. 28a (citing district court decision); Opp. at 22 ("Neenah appropriately chose to focus on developing an IEP that would provide Joel with FAPE in the least restrictive environment."). Again, the statute requires that the

IEP be the basis for the District's placement determination, not merely a document that conforms to and justifies a predetermined placement decision.

Petitioners have shown that this backward process, where the school district "determines" placement and *then* meets with the parents and formulates the IEP, eliminates the crucial role that parents play in helping to develop the IEP. Pet. at 22-23. This parental role is not only required by the statute, but also is a primary means to ensure that the IEP team makes a substantively appropriate placement decision. See *Winkelman ex rel. Winkelman* v. *Parma City Sch. Dist.*, 127 S. Ct. 1994, 2000-01 (2007) (discussing numerous IDEA provisions that "mandate or otherwise describe parental involvement"). As *amicus* Tourette Syndrome Association explains:

> The IEP meeting with parents provides school officials with an essential and incomparable window into the daily life, individual characteristics, strengths, and struggles of the child. Parents possess a wealth of information, gathered over the child's entire lifetime, giving them the most relevant and most comprehensive information on which the IEP should be based.

Br. for *Amicus Curiae* Tourette Syndrome Association, at 8. Moreover, parents play a particularly "indispensable role" in the IEP process when their children have "uncommon, complex, and often misunderstood disabilities." *Id.* at 3.

Contrary to respondent's contention, the court of appeals' decision will silence parents and therefore presents an issue of fundamental importance to the thousands of parents and students whose interests are protected by the procedural safeguards established under the IDEA. If the court of appeals'

decision is allowed to stand, countless school districts, under the guise of the "least restrictive environment" language, will choose a public placement as a means to avoid the Congressionally-required procedure of giving meaningful consideration to the parents' views in developing an appropriate educational program. This backward process will inevitably result in parents in the Seventh Circuit losing their opportunity meaningfully to participate in IEP meetings and, as a result, their children being placed in ostensibly "less restrictive" educational settings that do not provide them with appropriate educations.

* * * *

At the end of the day, it is essential that school districts and parents have a clear understanding of how the IEP process is supposed to work, particularly in cases where the parents oppose a school district's proposed public placement. See Br. for *Amicus Curiae* Autism Speaks, at 4 (parents and the public must have "confidence in the integrity of the IEP system"). The court of appeals' decision is irreconcilable with that of other circuits, creates needless confusion in this area, and should be "swiftly" corrected. Pet. App. 83a (Ripple, J., dissenting).

CONCLUSION

For the foregoing reasons, and for those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 07-1178

In the
Supreme Court of the United States

JOEL HJORTNESS, a minor, by and through his Parents and Legal Guardians ERIC HJORTNESS and GAIL HJORTNESS, ERIC HJORTNESS, and GAIL HJORTNESS,

Petitioners,

– v. –

NEENAH JOINT SCHOOL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* AUTISM SPEAKS

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Autism Speaks' Motion for Leave to File Brief as *Amicus Curiae*

Comes now Autism Speaks to request leave to enter the above-referenced case and file a brief as *amicus curiae* pursuant to Rule 37. In support of its motion, Autism Speaks states:

1. In recent years, the autism community has been growing at an unprecedented rate, with the NIH and the CDC each estimating that, currently, 1 out of 150 children born today will be diagnosed with an autism disorder.

2. Autism Speaks is a national, not-for-profit organization dedicated to increasing awareness of autism spectrum disorders, funding research into the causes, prevention, treatments and potential cures for autism, and advocating for the needs of affected families.

3. Following mergers with other national autism organizations, Autism Speaks is now the largest not-for-profit organization in the world by resources dedicated to autism research, education and treatment and has chapters across the United States, Canada, and the United Kingdom.

4. Autism Speaks works closely with federal and state governments, as well as the U.S. military, to meet the needs of the ever-growing population of children with autism and parents of children with autism for access to treatment and education.

5. Autism Speaks has established a Federal Legal Appeals Project ("FLAP"), a national *pro bono* initiative at the federal level. Further detail concerning the mission and activities of Autism

Speaks and its FLAP are available on the Autism Speaks informational website, www.AutismSpeaks.org. Most recently, Autism Speaks filed an *amicus curiae* brief in the Tom F. case before the United States Supreme Court.

6. Autism Speaks seeks leave of court, in consent of Petitioners, to invoke *amicus* status and to file its proposed *amicus* brief in the form annexed hereto, supporting Petitioner's position on this appeal. Respondent will not consent to such relief, but Petitioners Joel Hjortness, Eric Hjortness, and Gail Hjortness have done so in writing (*see* Exhibit A).

7. Autism Speaks has absolutely no corporate affiliation or other relationship with the parties to this appeal. Autism Speaks seeks *amicus curiae* status because the core issues presented in this appeal are extremely important issues that affect the entire autism community. The affected community is going to be large given that the CDC and NIH report that, currently, 1 in 150 children born today will be diagnosed with an autism spectrum disorder.

8. Autism Speaks supports petitioner's position. If, as requested, this Court grants Autism Speaks' motion, the annexed proposed brief shows that Autism Speaks will be able to aid this Court's consideration by making the following points, among others:

- ✓ Congress is increasingly treating autism as a national priority;
- ✓ With appropriate placements, programming and services, many of the developmental

deficits associated with autism can be ameliorated;

- ✓ Inasmuch as autism is a serious communication disorder, it is essential that parents of children with autism have a voice and input at their child's IEP meeting that is meaningful and given bone fide consideration by the local educational agency; and

- ✓ The record here reflects that respondent impermissible "predetermined" petitioner Joel Hjortness's education program and in so doing, deprived Joel's parents of meaningful participation in the IEP process.

WHEREFORE, Autism Speaks and Gary S. Mayerson respectfully request that the Court grant this motion to file a brief as *amicus curia*.

Dated: April 17, 2008
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Interest of *Amicus Curiae*[1]

Amicus curiae Autism Speaks is a not-for-profit organization dedicated to increasing awareness of autism spectrum disorders, funding research into the causes, prevention, treatments and potential cures for autism, and advocating for the needs of affected families. Following mergers with other national autism organizations, Autism Speaks is now the largest not-for-profit organization in the world by resources dedicated to autism research, education and treatment and has chapters across the United States, Canada, and the United Kingdom. Autism Speaks works closely with federal, state and local governments, as well as the U.S. military, to meet the needs of the ever-growing population of children with autism and parents of children with autism for access to treatment and education.

Autism Speaks can offer valuable insights into the special educational challenges faced by children with autism and their families and the potential impact of the Court's decision on thousands of families across the nation who struggle at educational planning (IEP) meetings in an effort to secure effective teaching and programming.

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[1] Pursuant to this Court's Rule 37.6 we note that no part of this brief was authored by counsel for any party, and no person or entity other than Autism Speaks, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. This brief was filed with the written consent of Petitioners, but not Respondent.

Early, intensive and effective special education services are critical to give a young child the chance to remediate and overcome the symptoms of autism and to grow into a productive, self-sufficient member of society.

Since autism is, at its essence, a serious communication disorder, it is essential that parents have a voice at IEP meetings that is genuinely and meaningfully considered by the local educational agency. Where, as here, the IEP result is impermissibly "predetermined," the child is deprived of a FAPE and the child's parents are deprived of their independent IDEIA entitlements. Winkelman v. Parma City Sch. Dist., 127 S.Ct. 1994 (2007).

The result advocated by the Respondent would jeopardize parents' ability to secure appropriate services for their child at precisely the point when an appropriate program is most critical and, conversely, when the damage caused by an inappropriate placement is the gravest. The harm that an inappropriate program can cause to a child's development during this window of opportunity can never be fully corrected.

Preliminary Statement

Autism, a pervasive and devastating developmental disorder, is a 24-7 workaholic that does not know how to take a break or holiday. Without appropriate and effective teaching and intervention, autism ruins lives and destroys families. Absent appropriate and effective intervention, children with autism grow up to be adults with autism, often requiring costly and sometimes lifelong institutional care. Considering that the National Institutes of Health and the Center for Disease Control are reporting that 1 in 150 children born today will be diagnosed with an autism spectrum disorder, effective and timely intervention is absolutely critical, not only for the child and the child's family, but for society in general.[2]

Although Congress has never defined specifically what a "free and appropriate education" ("FAPE") must consist of (presumably because of the Act's "individualization" requirement), twenty five years ago, the Supreme Court held that the educational (FAPE) benefit required under IDEA must be more than a mere *di minimus* benefit. Board of Educ. v. Rowley, 458 U.S. 176 (1982). *See also* O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, 144 F.3d 692 (10th Cir. 1998). *Cf.* Frank G. v. Board of Educ., 459 F.3d 356 (2d Cir. 2006), *cert denied*, Board of Educ. v. Frank G., 2007 U.S. LEXIS 11520 (U.S. Oct. 15, 2007) ("While the IDEIA does not require

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[2] Until relatively recently, autism was a rarely-diagnosed and little-known condition, but is now more prevalent among children than Down syndrome, diabetes, cystic fibrosis, and cancer.

states to maximize the potential of handicapped children...it must provide such children with "meaningful access" to education....[the IEP] must be "likely to produce progress, not regression") (internal citations omitted); Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 248 (5th Cir. 1997) (IEP must be likely to produce progress, not regression).

In Deal v. Hamilton County Board of Educ., 392 F.3d 840 (6th Cir. 2004), a unanimous Sixth Circuit, held that "predetermination" of the IEP by the local educational agency amounts to a serious procedural and substantive FAPE deprivation because it deprived parents of meaningful participation in the IEP process and thus prevents genuine individualization of the IEP.

Accordingly, the mere physical presence of parents at an IEP meeting is not enough. Nor is it enough that parents are "allowed" to ask questions. Where, as here, the IEP result has been predetermined by the school district, the IEP process is turned into a sham.

In order to have public confidence in the integrity of the IEP system, parents must be confident in the knowledge that the result has not been predetermined. All too often, for children with autism, their parents are their only hope for a voice in the development of what is supposed to be an "individualized" IEP. Predetermination effectively silences, in advance, that voice.

Argument

A. Congress is increasingly treating Autism as a national priority

As the incidence of Autism Spectrum Disorder has mushroomed, Congress increasingly has treated Autism as a national priority. In recent years, autism has grown dramatically more prevalent. In 1961, it was confidently asserted that "[i]nfantile autism is a relatively rare form of schizophrenia and is not important from an epidemiological point of view." C.B. Ferster, *Positive Reinforcement and Behavioral Deficits of Autistic Children*, 32 CHILD DEVELOPMENT 437, 437 (1961), *reprinted in* CLASSIC READINGS IN AUTISM 53 (Anne M. Donnellan ed., 1985). Even in 1993, shortly after the Department of Education began collecting statistics on autism, it classified only 19,058 children between 6 and 21 as having autism.[3] Office of Special Education and Rehabilitative Services, Department of Education, 26TH ANNUAL (2004) REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (2006). But in 2005, the Department of Education reported 192,643 autistic students between the ages of 6 and 21 – a more than tenfold increase. Office of Special Education and

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[3] Autism was added as a specifically-identified category of disability under IDEA by the Education of the Handicapped Act Amendments of 1990, Pub. L. 101-467, §101, 104 Stat. 1103, 1142 (1990). It is very difficult to determine the prevalence of autism before the 1990s.

Rehabilitative Services, Office of Special Education Programs, U.S. Department of Education, Data Analysis System (DANS), 1976-2005, *Table 1-3, Students ages 6 through 21 served under IDEA, Part B, by disability category and state: Fall 2005.* The Centers for Disease Control report rates as high as 1 in every 150 children. Catherine Rice, *Prevalence of Autism Spectrum Disorders – Autism and Developmental Disabilities Monitoring Network, 14 Sites, United States, 2002*, 56 MORBIDITY AND MORTALITY WEEKLY REPORT SS-1, 12 at 12 (Feb. 9, 2007) ("CDC, *14 Sites Study*"). With some 24,000 children with autism born each year, Autism Spectrum Disorder is now more common among children than Down syndrome, diabetes, cancer, cystic fibrosis, hemophilia, and sickle cell disease. S. Rep. No. 109-318 at 3 (2006).

As the incidence of autism has grown, Congress increasingly has made autism research and education a national priority. Autism was specifically identified as a disability under IDEA in 1991. *See* 20 U.S.C. §1401(3)(a)(i); Education of the Handicapped Act Amendments of 1990, Pub. L. 101-467, Title I, §101, Title IX, §901(b)(10) to (20), 104 Stat. 1103, 1142, 1143 (1990). The Children's Health Act of 2000 directed the National Institutes of Health to expand and intensify autism research and mandated the creation of an Interagency Autism Coordinating Committee to coordinate autism research and other efforts within the Department of Health and Human Services. Children's Health Act of 2000, Pub. L. 106-310, Title I, 114 Stat. 1101 (2000). In 2004, IDEA was amended to encourage the Department of Education to support the development of programs

to train special education teachers in autism disorders, and provide technical assistance and in-service training to schools and personnel servicing children with autism spectrum disorders. 20 U.S.C. §1462(b)(2)(G), 20 U.S.C. §1463(c)(8)(D). *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. 108-446, Title I, 118 Stat. 2647, 2677 & 2682 (2004).

Most recently, Congress enacted the Combating Autism Act of 2006 to dramatically increase funding for autism research, detection and intervention and to promote interagency coordination of autism-related activities through the NIH. *See* Combating Autism Act of 2006, Pub. L. 109-416, 120 Stat. 2821 (2006); S. Rep. No. 109-318 at 18-20.

B. With appropriate placements, programming and services, many of the developmental deficits associated with Autism can be ameliorated

Autism is a spectrum disorder encompassing a range of developmental disorders related to impaired social function, impaired communication and repetitive, stereotyped behaviors. The degree and manifestation of impairments can vary dramatically from individual to individual, and the spectrum of disorders includes Asperger's Disorder and Pervasive Developmental Disorder, Not Otherwise Specified ("PDD-NOS"). *See* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION, TEXT REVISION at 69-75 (4th ed. 2000) ("DSM-IV-TR"); S. Rep. No. 109-318, 2-3 (2006). Most children with autism show an "inability to relate themselves in the ordinary way to people and situations from the

beginning of life." Leo Kanner, *Autistic Disturbances of Affective Contact*, 2 NERVOUS CHILD 217 (1943), *reprinted in* CLASSIC READINGS IN AUTISM at 41 (Anne M. Donnellan ed., 1985) (emphasis omitted). Impaired communication is another classic symptom of autism. Approximately 40 percent of children with autism do not talk, and others have difficulty learning to use language for communicative purposes. S. Rep. No. 109-318 at 2; DSM-IV-TR at 70. Many children with autism also demonstrate restricted and stereotypical patterns of behavior or interests, an insistence on predictability, and great difficulty coping with unexpected changes to their routine. S. Rep. No. 109-318 at 3; DSM-IV-TR at 71.

Symptoms generally manifest early, usually before the child's third birthday and as soon as eighteen months or earlier; in some cases symptoms are present almost from birth.[4] S. Rep. No. 109-318 at 3, 9; Autism Spectrum Disorder Expert Working Group, Interagency Autism Coordinating Committee, National Institute of Mental Health, Department of Health and Human Services, AUTISM SPECTRUM DISORDERS ROADMAP (May 16, 2005) ("Roadmap"). Yet children with autism frequently are not identified until after they have entered the public school system. S. Rep. No. 109-318 at 3, 9; Roadmap at 8.[5]

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[4] The Working Group was created by the Interagency Autism Coordinating Committee at the National Institute of Mental Health. S. Rep. No. 109-318 at 2.

[5] With a median age at diagnosis of 52-56 months, half of autistic children are not diagnosed until they are nearly 5 years old or later. Catherine Rice, *Prevalence of Autism Spectrum Disorders: Autism and Developmental Disabilities Monitoring*

While the cause or causes of autism are still unclear, there is broad agreement that the symptoms of autism often can be significantly ameliorated. Appropriate education offers the possibility that children with autism can achieve self-sufficiency and become functioning, contributing members of society rather than permanent financial and emotional burdens on their families and on the public treasury.[6]

Parents cannot allow their child to languish in an inappropriate setting when every passing moment erodes potential benefits that can never be regained. For these children and their parents, "every moment counts." Laurie Tarkan, *Autism Therapy Is Called Effective, but Rare*, N.Y. TIMES, Oct. 22, 2002 (describing the "horrible feeling of time slipping away and nothing being done" when parents of children with autism don't have access to appropriate treatment); *see also* County Sch. Board of Henrico County v. R.T., 433 F. Supp. 2d 692, 696 (E.D.Va. 2006) ("a critical window of developmental opportunity was closing" for a child who was not receiving an adequate public education). "Children

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Network, Six Sites, United States, 2000, 56 MORBIDITY AND MORTALITY WEEKLY REVIEW SS-1, 1 at 1 (Feb. 9, 2007). In some locations, the median age of diagnosis is 66 months, meaning that half of children diagnosed with autism are not identified until after they are more than 5 ½ years old. CDC, *14 Sites Study* at 20.

[6] For descriptions of autistic children who have grown into productive – even remarkable – adults, *see, e.g.*, Oliver Sacks, AN ANTHROPOLOGIST ON MARS 244-296 (1995); Clara Claiborne Park, EXITING NIRVANA (2001); Stephen M. Shore, BEYOND THE WALL (2001); Kamran Nazeer, SEND IN THE IDIOTS (2006).

with autism can't afford to waste a second... With the right kind of early intervention, they can learn. Without it, there's no hope." Leslie C. Feller, *When Autistic Child's Growth Is at Stake*, N.Y. TIMES, Apr. 25, 1999 (internal quotation omitted).

Conclusion

For the foregoing reasons, *amicus curiae* Autism Speaks respectfully requests that this Court reverse the judgment of the Seventh Circuit Court of Appeals and grant such other and further relief as it deems just and proper.

Dated: April 17, 2008
New York, New York

Respectfully submitted,

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No. 07-1178

IN THE

Supreme Court of the United States

JOEL HJORTNESS, A MINOR, BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS ERIC HJORTNESS AND GAIL HJORTNESS, ERIC HJORTNESS, AND GAIL HJORTNESS,

Petitioners,

v.

NEENAH JOINT SCHOOL DISTRICT,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

MOTION OF TOURETTE SYNDROME ASSOCIATION, INC. FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI, AND BRIEF ATTACHED

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STATEMENT

The Tourette Syndrome Association, Inc. ("TSA") hereby respectfully moves for leave pursuant to Rule 37 of the Rules of the Supreme Court of the United States to file the attached brief, *amicus curiae*, in support of the petitioners Joel Hjortness, a minor, by and through his parents and legal guardians Eric Hjortness and Gail Hjortness, Eric Hjortness,

and Gail Hjortness. Attorneys for petitioners consented thereto. The consent of the attorney for respondent was requested but refused.

THE *AMICUS* AND ITS INTEREST

TSA is the national non-profit organization dedicated to assisting persons living with Tourette Syndrome ("TS"). TSA's mission is to identify the cause of, find the cure for, and control the effects of TS. TSA educates parents of youngsters with TS about the complex nature of TS and its co-morbid neurobiological conditions, and also offers resources and referrals to help people with TS and their families cope with the many issues associated with TS. TSA strives to raise public awareness about TS and works to correct the inaccurate media and public stereotypes about TS. TSA also endeavors to educate teachers, medical professionals, and other professionals about TS. TSA's membership includes, among others, individuals, families, relatives, doctors, scientists, and other professionals working in the field. Since its founding, TSA has grown into a major national health-related organization with 31 chapters in the United States, one regional office, 125 support groups, and contacts around the world.

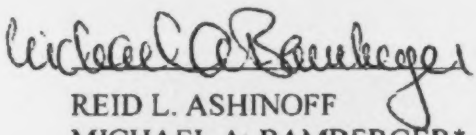
The interest of *amicus* reflects the essential need of children with TS to have their parents explain their complex disability and advocate their unique needs to educators who are deciding how to best educate these children, as well as the right of those parents to collaborate in making the best and appropriate choices for these children. TSA's brief will demonstrate how the substantive and procedural safeguards of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, play an indispensable role and

provide a vital benefit to children with uncommon, complex, and often misunderstood disabilities such as TS. Children with TS enjoy the protections of these safeguards – provided they have the good fortune to live within the jurisdiction of the Third, Fourth, Sixth, and Ninth Circuits. TSA is concerned for children with TS living within the jurisdiction of the Seventh Circuit whose decision below turns these valuable and meaningful protections into mere formalities.

Unless this Court reverses the Seventh Circuit and reaffirms the importance of the IDEA's substantive and procedural safeguards, children with uncommon, complex and often misunderstood disabilities such as TS will be deprived free and appropriate educations.

In light of the foregoing, TSA respectfully requests leave to file the attached brief.

Respectfully submitted,



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BRIEF OF TOURETTE SYNDROME ASSOCIATION, INC., AS AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

STATEMENT

The Tourette Syndrome Association, Inc. ("TSA") submits this brief, *amicus curiae*, in support of the petitioners Joel Hjortness, a minor, by and through his parents and legal guardians Eric Hjortness and Gail Hjortness, Eric Hjortness,

and Gail Hjortness, having submitted a motion for permission to file same.[1]

THE *AMICUS* AND ITS INTEREST

TSA is the national non-profit organization dedicated to assisting persons living with Tourette Syndrome ("TS"). TSA's mission is to identify the cause of, find the cure for, and control the effects of TS. TSA educates parents of youngsters with TS about the complex nature of TS and its co-morbid neurobiological conditions, and also offers resources and referrals to help people with TS and their families cope with the many issues associated with TS. TSA strives to raise public awareness about TS and works to correct the inaccurate media and public stereotypes about TS. TSA also endeavors to educate teachers, medical professionals, and other professionals about TS. TSA's membership includes, among others, individuals, families, relatives, doctors, scientists, and other professionals working in the field. Since its founding, TSA has grown into a major national health-related organization with 31 chapters in the United States, one regional office, 125 support groups, and contacts around the world.

The interest of *amicus* reflects the essential need of children with TS to have their parents explain their complex

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The Petitioners have consented to the filing of this brief and both parties have been given at least 10 days notice of *amicus'* intention to file. Sup. Ct. R. 37.6.

disability and advocate their unique needs to educators who are deciding how to best educate these children, as well as the right of those parents to collaborate in making the best and appropriate choices for these children. TSA's brief will demonstrate how the substantive and procedural safeguards of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, play an indispensable role and provide a vital benefit to children with uncommon, complex, and often misunderstood disabilities such as TS. Children with TS enjoy the protections of these safeguards – provided they have the good fortune to live within the jurisdiction of the Third, Fourth, Sixth, and Ninth Circuits. TSA is concerned for children with TS living within the jurisdiction of the Seventh Circuit whose decision below turns these valuable and meaningful protections into mere formalities.

Introduction

TS manifests itself in a multitude of different ways and in various times in different individuals. TS is a neurological disorder which becomes evident in early childhood or adolescence between the ages of 2 and 8. TS is defined by multiple tics – sudden, repetitive, non-rhythmic, and involuntary movements (motor tics) and/or sudden repetitive, non-rhythmic, involuntary utterances (vocal tics) – that last for more than one year. TS usually first presents itself through involuntary motor tics in the face, arms, limbs or trunk. The most common first symptom of TS is a facial tic such as an eye blink, nose twitch, or grimace. Subsequently, these initial symptoms are replaced or added to by the expression of other tics of the neck, trunk, and limbs. Tics may also be more complicated and for some, involve the entire body in actions such as kicking, stamping, or jumping.

Verbal tics or vocalizations occur with the motor tics. Verbal tics may include vocalizations such as grunting, throat clearing, shouting, or barking.

Despite widespread publicity, the involuntary use of obscene or socially inappropriate words or phrases (coprolalia) and gestures (copropraxia) are uncommon with TS. Neither coprolalia nor copropraxia are necessary for a diagnosis of TS.

Although some people with TS report what are described as premonitory urges (i.e., a very brief feeling right before expressing their motor or vocal tics), it should be understood that all tics are involuntary and thus outside the person's control.

Other symptoms of TS may include "Echo phenomena" such as repeating words of others (echolalia), repeating ones own words (palilalia), or repeating the movements of others. TS is frequently comorbid with other conditions such as Attention Deficit & Hyperactivity Disorder, Oppositional Defiant Disorder, Obsessive-Compulsive Disorder, impulsiveness, and various learning disabilities.

Although the symptoms of TS vary from person to person and range from very mild to severe, the majority of cases are mild. TS and other tic disorders occur in all ethnic groups. Males are affected 3 to 4 times more often than females.

Most people with TS and other tic disorders lead productive lives. There are no barriers to achievement in their personal or professional lives and persons with TS can be found in all professions. One goal of TSA is to educate both patients and the public about the many facets of tic disorders. Increased public understanding and tolerance of

TS symptoms are of paramount importance to people with TS and to the TSA.

Because of the significant social and emotional impact of coping with TS in school-age children, it is important that this social and emotional impact not be aggravated by unnecessary school difficulties. The IDEA plays an indispensable role and provides a vital benefit in helping students with TS obtain an appropriate education. However, as more fully discussed below, when parents are denied the opportunity to meaningfully participate in the creation of their child's individualized education plan ("IEP") and when schools are allowed to make placement decisions before an IEP meeting has taken place, students with TS, as well as other disabilities, are stripped of the vital benefits to which they are entitled under the IDEA.

ARGUMENT

REAFFIRMING THE STATUTORY MANDATE THAT A SCHOOL DISTRICT MAY NOT PREDETERMINE A DISABLED CHILD'S PLACEMENT BEFORE THE IEP MEETING WITH THE PARENTS AND THE SUBSEQUENT FORMULATION OF AN IEP TAILORED TO THE UNIQUE NEEDS OF THE SPECIFIC CHILD IS OF PARTICULAR IMPORTANCE WHEN THE NATURE OF THE DISABILITY IS COMPLEX, MISUNDERSTOOD, AND NOT GENERALLY WELL-KNOWN.

The IDEA lists its purposes in the statute. The first two listed purposes are:

> (1)(A) to ensure that all children with disabilities have available to them a free

> appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;
>
> (B) to ensure that the rights of children with disabilities and parents of such children are protected;

§ 1400(d)(1)(A) and (B).

These purposes recognize both the unique needs of each and every child with a disability and the significant role the parents play in the lives of those children. Toward that end, the IDEA contains mandatory provisions to effectuate these purposes with the goal of providing each child with a "free appropriate public education." This education must be "specially designed ... to meet the unique needs of a child with a disability," (§1401(29) (emphasis added), and may take place in the regular public school system or, if appropriate, at a private school or facility. § 1412(a)(10).

This Court has recently described the procedure for the development of the IEP to match the child's unique needs:

> IDEA requires school districts to develop an IEP for each child with a disability, see §§ 1412(a)(4), 1414(d), with parents playing "a significant role" in this process. Parents serve as members of the team that develops the IEP. § 1414(d)(1)(B). The "concerns" parents have "for enhancing the education of their child" must be considered by the team. § 1414(d)(3)(A)(ii). IDEA accords parents additional protections that apply throughout the IEP process. See, *e.g.*, § 1414(4)(A)

> (requiring the IEP Team to revise the IEP when appropriate to address certain information provided by the parents); § 1414(e) (requiring States to "ensure that parents of [a child with a disability] are members of any group that makes decisions on the educational placement of their child"). The statute also sets up general procedural safeguards that protect the informed involvement of parents in the development of an education for their child. See, *e.g.*, § 1415(a) (requiring States to "establish and maintain procedures ... to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education"); § 1415(b)(1) (mandating that States provide an opportunity for parents to examine all relevant records). See generally §§ 1414, 1415. A central purpose of the parental protections is to facilitate the provision of a " 'free appropriate public education,' " § 1401(9), which must be made available to the child "in conformity with the [IEP]," § 1401(9)(D).

Winkelman ex rel. Winkelman v. Parma School Dist., 127 Sup. Ct. 1994, 2000 (2007).

The procedure described in Winkelman was not followed in this case. As found by the Administrative Law Judge (whose findings were not overturned by the district court or court of appeals), the conclusions of the IEP and the placement decision were pre-determined, thus denying the parents "meaningful participation" in the IEP and placement processes. (Pet. For Writ of Cert., App. C, 56a.) Moreover,

the Administrative Law Judge found that the IEP contained numerous goals that were not discussed at the IEP meeting and was finalized by drafters "without assistance from the IEP team." (Pet. For Writ of Cert., App. C, 64a.)

Additionally, as set forth by petitioners in their petition and in the opinions of the Third, Fourth, Sixth, and Ninth Circuits[2], the IDEA requires that the determination of the appropriate school placement for a child with disabilities must follow the promulgation of and be based on the goals of an IEP that has been previously developed with the child's parents' input.

This statutorily mandated timing makes good sense. Teachers and school administrators see and interact with students with disabilities for only part of the day and in a single venue; a venue which, for children with TS, may well be particularly stressful. The IEP meeting with parents provides school officials with an essential and incomparable window into the daily life, individual characteristics, strengths, and struggles of the child. Parents possess a wealth of information, gathered over the child's entire lifetime, giving them the most relevant and most comprehensive information on which the IEP should be based.

This is particularly true and necessary where, as here, the student's disability is neurological and, at least as to its TS component, not well-known and often misunderstood. By their nature, neurologically-based disabilities are

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[2] Fuhrmann ex rel. Fuhrmann v. E. Hanover Bd. of Educ., 993 F. 2d 1031 (3d Cir. 1993); Spielberg ex rel. Spielberg v. Henrico County Pub. Sch., 853 F. 2d 256 (4th Cir. 1988) (under predecessor statute); Deal v. Hamilton County Bd. of Educ., 392 F. 3d 840 (6th Cir. 2004); W.G. v. Bd. of Trs., 960 F. 2d 1479 (9th Cir. 1992); See also Schoenbach v. Dist. of Columbia, No. 05-1591, 2006 WL 1663426 (D.D.C. June 12, 2006).

particularly difficult to analyze because their causes and effects are not physically visible.[3] Additionally, the symptoms of TS vary between individuals and may not be constant or regular in the same individual over the course of time – with differences ranging from minor motor and vocal tics to loud and offensive verbal outbursts. To be effective, the development of IEPs and subsequent placement decisions must be based on each individual student, not on classes of disorders, preconceived notions about disorders, or even a student's IEP developed for a previous school year.

It is not known precisely how many persons have TS, but epidemiological studies indicate that the number of affected children is estimated at 250,000.[4] Those who are not well acquainted with TS – including many teachers and school officials – often assume that, if the person with TS "really tries," he or she can stop or control their motor and vocal tics. IEPs should not be developed and placement decisions should not be made without such preconceived notions being corrected and addressed by the student's parents.

The IDEA does not distinguish among disabilities. Thus, while compliance with the mandated procedures of the IDEA is universally applicable and legally required, the failure to comply is particularly harmful to the interests of the

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[3] The difficulty is compounded when, as is often the case, the child has a number of overlapping neurological conditions. Thus, in this case, the ALJ found that Joel Hjortness had been diagnosed with severe behavioral and emotional disabilities, including at various times "obsessive compulsive disorder, Tourette's disorder, attention deficit/hyperactivity disorder, autistic spectrum disorder, oppositional defiant disorder, and anxiety disorder." (Pet. For Writ of Cert., App. C, 39a.)

[4] Scahill, L., Williams, S., Schwab-Stone, M., Applegate, J. Leckman, J.F., 2006; *Advances in Neurology*, vol.99: pp184-190.

child, for whose benefit the IDEA was passed, when determining the "unique" requirements of a child with a neurological disorder such as TS.

CONCLUSION

Congress, in drafting the IDEA, recognized the necessity of, and required, a broadly scoped examination of the unique disabilities of the individual child jointly by parents and school officials and the development of an individualized IEP based on that examination. Further, children are likely to be deprived appropriate educations when school placement decisions are made before the IEP has been properly developed. *Amicus* TSA urges that the petition for a writ of certiorari be granted so that the intent of Congress and the language of the IDEA may be upheld.

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